Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1558

VIRGINIA CRAMER,
And All Those Similarly Situated,
Petitioner,
vs.
METROPOLITAN FEDERAL SAVINGS and LOAN ASSOCIATION,
And All Those Similarly Situated,
Respondents
DOCKET NO. 57215

PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

VIRGINIA CRAMER
In Propria Persona
27314 Clairview
Dearborn Heights, Michigan
48127
(313) 278-7286
Petitioner

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1. Where the Michigan courts, before submission of the case, on a suit to enjoin a wrongful foreclosure by advertisement, allows the testimony of defendant-lending-institution to be heard and refused to hear any of plaintiff-mortgagor's testimony of certain material facts essential to its decision and said court takes judicial notice of erroneous material facts not appearing in the record and no proofs presented and finds your mortgagor-Petitioner in default of a mortgage, or that she "refused to pay "escrow" and where no debt was established and allows the mortgagee to proceed with the foreclosure when, in fact, mortgagor was not in default of said mortgage which is easily proven by sequential dates of occurrences and performances of both mortgagor

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and mortgagee, and which the Michigan courts refused to hear as testimony, and without any party requesting the said court to take judicial notice of anything as a substitute for proofs of the facts, and where the erroneous facts thus noticed and the inferences drawn therefrom by the Michigan Court of Appeals and the Michigan Supreme Court support a new theory of a case made under false facts and remedy therefore, contrary to the allegations and admissions of either party in said case, and contrary to any theory asserted in the pleadings of said case, and contrary to such certain material facts supported in the record of the case, had Petitioner been deprived of one of the elements of due process of law guaranteed by the Fifth or Fourteenth Amendments to the Constitution of the United States on the grounds that Petitioner's evidence on wrongful foreclosure where Petitioner was not in default of the mortgage terms of contract has not been heard, and not allowed to be heard, and the court's system has barred Petitioner from being heard and Petitioner has been refused a day in court and deprived of the opportunity in the Michigan State courts to dispute, with proof, the erroneous facts and notoriety of the erroneous facts judicially noticed and any inferences to be drawn therefrom? 50-103

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2. Where the Michigan Court of Appeals and the Michigan Supreme Court, after submission of part of the case to a jury, and where Petitioner was prevented and precluded from submitting essential material facts pertinent to the whole of the case as to mortgagee's misconduct in effecting a foreclosure by advertisement where mortgagor was not in default of said mortgage contract, and which the lower court refused to hear any of mortgagor's testimony of certain material facts essential to any kind of decision pertaining to breach of fiduciary relationship between mortgagor and mortgagee, and where mortgagee foreclosed by advertisement on mortgagor's property where mortgagor was not in default of the mortgage contract but that the mortgagee had demanded excessive "escrow" moneys disputed by mortgagor, for payment of future taxes and insurance, and that mortgagee had repeatedly failed to pay taxes when due on mortgagor's property with mortgagor's "escrow" funds in the possession of the mortgagee and where mortgagee admitted utilizing said "escrow" funds for other purposes and profitting to only mortgagee's benefit, and by the mortgage contract inhibiting mortgagor from paying her own liabilities as to taxes and insurance and thereby inhibiting mortgagor from complying with laws, regulations, ordinances of governmental authorities, while mortgagee is mishandling mortgagor's "escrow" funds, and the jury finds the defendant-mortgagee "not guilty" and

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fails to rule on whether a trust or fiduciary relationship exists between an "escrow-holder-mortgagee" and an "escrow-payor-mortgagor" where said jury failed to follow the court's instructions, and the Michigan Court of Appeals and the Michigan Supreme Court affirm that "the foreclosure was licit" where mortgagor was not permitted to offer material and essential facts because the court had previously deprived Petitioner the opportunity to testify and present proofs that she was not in default of the mortgage, and where the court allowed the mortgagee to proceed with the foreclosure in the absence of establishing any debt, and the jury was not given the opportunity to hear any testimony relative to the wrongful foreclosure, and the Michigan Court of Appeals and the Michigan Supreme Court has taken judicial notice of erroneous material facts essential to its decision and from the erroneous facts thus judicially noticed and by way of inference has drawn conclusions from such erroneous facts to support that "the foreclosure was licit" where Petitioner-mortgagor was denied and deprived of the opportunity to submit material and essential facts that she was not in default of the mortgage terms of the contract, and that she suffered damages as a result of the wrongful foreclosure where she was not in default and no debt was established, and that the judiciary permitted the enforcement of an illegal contract by Sheriff's sale for the purpose of taking Petitioner's property, is State action involved under

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color of law and has Petitioner been deprived of her right to a trial by jury guaranteed by the Seventh and Fourteenth Amendments to the Constitution of the United States on the grounds that the erroneous facts judicially noticed effected the wrongful foreclosure where mortgagor was not in default and mortgagor was not permitted to present said erroneous judicial notice to the jury and thus Petitioner has been denied the opportunity to present facts on a theory of recovery of damages so wrongfully sustained by the wrongful foreclosure where the court permitted the mortgagee to proceed on the wrongful foreclosure? 104-128

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In The

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October Term, 1977

No. _____

VIRGINIA CRAMER,
Petitioner,
vs.

METROPOLITAN FEDERAL SAVINGS
AND LOAN ASSOCIATION,
Respondents
Docket No. 57215

PETITION FOR WRIT OF CERTIORARI

TO THE MICHIGAN SUPREME COURT

(Figures designated App.1, et seq., refer to Appendix pages in this Petition. Figures (a), et seq. refer to pages of Petitioner's Appendices used in the Michigan State courts. Nine (9) copies of Petitioner's Brief on Appeal-Appellant and Nine (9) copies of Petitioner's Appendix on Appeal, Volumes I and II, with pages marked (a) and certified by the Clerk of the Michigan Supreme Court, are filed herewith. Forty (40) copies of Petition for Writ of Certiorari to the Michigan Supreme Court in the United States Supreme Court are filed herewith.)

ORAL ARGUMENT IS REQUESTED

Petitioner, Virginia Cramer, prays that a writ of certiorari issue to review the judgment of the Michigan Supreme Court entered in the above-entitled cause on October 6, 1977, and rehearing denied on December 15, 1977, and motion for stay in publication of Michigan Supreme Court's judgment, treated as application for rehearing and denied on February 1, 1978.

OPINIONS BELOW

1. Wayne Circuit Court "Order Dissolving Temporary Restraining Order" dated September 27, 1968, infra — Appendix "D"

2. Wayne Circuit Court summary judgment - res judicata - dated March 30, 1970, infra — Appendix "F"

3. Michigan Court of Appeals, Docket 9619, reversed, dated July 22, 1971, reported at 34 Mich App 638, 192 NW2d 50 (1971), infra — Appendix "G"

4. Order Granting Plaintiff's Motion to Strike Paragraphs 2 and 8 of Defendants Affirmative Defenses, dated August 20, 1971, infra — Appendix "Hd"

5. Wayne Circuit Court summary judgment, dated March 27, 1972, infra — Appendix "I"

6. Michigan Court of Appeals, Docket 14149, unpublished, dated May 29, 1973, reversed as to Count IV alleging Breach of Fiduciary relationship, affirmed as to Counts I, II, III, V and VI of Plaintiff's Second Amended Complaint, infra — Appendix "J"

7. Jury decision - on allegation of breach of fiduciary duty, Count IV, and Order entered dated November 14, 1973, infra — Appendix "K" Appendix "Ka"

8. Michigan Court of Appeals, Docket 18948, unpublished, dated June 21, 1975, infra — Appendix "L"

9. Michigan Supreme Court, Docket 57215, dated October 6, 1977, reported at 401 Mich 252, infra — Appendix "N"

10. Application for Rehearing, denied, dated December 15, 1977, infra — Appendix "O"

11. Motion for Stay of proceedings in publication of decision dated October 6, 1977, treated as application for rehearing and denied, Order entered February 1, 1978, infra — Appendix "P" Appendix "Q"

JURISDICTION

Final decision of Michigan Supreme Court was entered on October 6, 1977 (appendix N, infra) affirming the trial court and Michigan Court of Appeals opinions. Petitioner's application for rehearing was denied December 15, 1977 (appendix O, infra). Motion for Stay of proceedings in publication of Court's opinion, treated as application for rehearing, denied February 1, 1978 (appendices P and Q, infra).

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257 (3)

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1652

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and Statutes are pertinent:

Fifth Amendment to the Constitution of the United States, set forth in Appendix "S" infra.

Seventh Amendment to the Constitution of the United States, set forth in Appendix "U" infra.

Fourteenth Amendment to the Constitution of the United States, set forth in Appendix "T" infra.

28 U.S.C.A. 1257 (3), set forth in Appendix "R", infra

28 U.S.C.A. 1652, set forth in Appendix "V" infra.

U. S. Constitution, Art. 1, Sec. 10, set forth in Appendix "W", infra.

U. S. Constitution, Article III, set forth in Appendix " LL ", infra.

U. S. Constitution, Article IV, set forth in Appendix " MM ", infra.

12 U.S.C.A. 1454, et seq., set forth in Appendix "BB", infra.

12 U.S.C.A. 1461, et seq., set forth in Appendix "X", infra.

12 U.S.C.A. 1701, et seq., set forth in Appendix "Y", infra.

12 U.S.C.A. 1709, et seq., set forth in Appendix " AA ", infra.

15 U.S.C.A. 1, et seq., set forth in Appendix " GG ", infra.

15 U.S.C.A. 2, et seq., set forth in Appendix " HH ", infra.

15 U.S.C.A. 3, et seq., set forth in Appendix " II ", infra.

15 U.S.C.A. 12, et seq., set forth in Appendix " JJ ", infra.

18 U.S.C.A. Section 648, set forth in Appendix " KK ", infra.

28 U.S.C.A. Section 2201, et seq., set forth in Appendix " FF ", infra.

42 U.S.C.A. Section 1983, set forth in Appendix " DD ", infra.

42 U.S.C.A. Section 1985, et seq., set forth in Appendix " EE ", infra.

12 Code of Federal Regulations 545.6-1, et seq., set forth in Appendix " CC ", infra.

QUESTIONS PRESENTED

1. Where the Michigan courts, before submission of the case, on a suit to enjoin a wrongful foreclosure by advertisement, allows the testimony of the defendant-lending-institution to be heard and refused to hear any of plaintiff-mortgagor's testimony of certain material facts essential to its decision and said court takes judicial notice of erroneous material facts not appearing in the record and no proofs presented and finds your mortgagor-Petitioner in default of a mortgage, or that she "refused to pay "escrow" and where no debt was established and allows the mortgagee to proceed with the foreclosure when, in fact, mortgagor was not in default of said mortgage which is easily proven by sequential dates of occurrences and performances of both mortgagor and mortgagee, and which the Michigan courts refused to hear as testimony, and without any party requesting the said court to take judicial notice of anything as a substitute for proofs of the facts, and where the erroneous facts thus noticed and the inferences drawn therefrom by the Michigan Court of Appeals and the Michigan Supreme Court support a new theory of a case made under false facts and remedy therefore, contrary to the allegations and admissions of either party in said case, and contrary to any theory asserted in the pleadings of said case, and contrary to such certain material facts supported in the record of the case, had Petitioner been deprived of one of the elements of due process of law guaranteed by the Fifty or Fourteenth Amendments to the Constitution of the United States on the grounds that Petitioner's evidence on wrongful foreclosure where Petitioner was not in default of the mortgage terms of contract has not been heard, and not allowed to be heard, and the court's system has barred Petitioner from being heard and Petitioner has been refused a day in court and deprived of the opportunity in the

Michigan State courts to dispute, with proof, the erroneous facts and notoriety of the erroneous facts judicially noticed and any inferences to be drawn therefrom?

2. Where the Michigan Court of Appeals and the Michigan Supreme Court, after submission of part of the case to a jury, and where Petitioner was prevented and precluded from submitting essential material facts pertinent to the whole of the case as to mortgagee's misconduct in effecting a foreclosure by advertisement where mortgagor was not in default of said mortgage contract, and which the lower court refused to hear any of mortgagor's testimony of certain material facts essential to any kind of decision pertaining to breach of fiduciary relationship between mortgagor and mortgagee, and where mortgagee foreclosed by advertisement on mortgagor's property where mortgagor was not in default of the mortgage contract but that the mortgagee had demanded excessive "escrow" moneys disputed by mortgagor, for payment of future taxes and insurance, and that mortgagee had repeatedly failed to pay taxes when due on mortgagor's property with mortgagor's "escrow" funds in the possession of the mortgagee and where mortgagee admitted utilizing said "escrow" funds for other purposes and profitting to only mortgagee's benefit, and by the mortgage contract inhibiting mortgagor from paying her own liabilities as to taxes and insurance and thereby inhibiting mortgagor from complying with laws, regulations, ordinances of governmental authorities, while mortgagee is mishandling mortgagor's "escrow" funds, and the jury finds the defendant-mortgagee "not guilty" and fails to rule on whether a trust or fiduciary relationship exists between an "escrow-holder-mortgagee" and an "escrow-payor-mortgagor" where said jury failed to follow the court's instructions, and the Michigan Court of Appeals and the Michigan Supreme

Court affirm that "the foreclosure was licit" where mortgagor was not permitted to offer material and essential facts because the court had previously deprived Petitioner the opportunity to testify and present proofs that she was not in default of the mortgage, and where the court allowed the mortgagee to proceed with the foreclosure in the absence of establishing any debt, and the jury was not given the opportunity to hear any testimony relative to the wrongful foreclosure, and the Michigan Court of Appeals and the Michigan Supreme Court has taken judicial notice of erroneous material facts essential to its decision and from the erroneous facts thus judicially noticed and by way of inference has drawn conclusions from such erroneous facts to support that "the foreclosure was licit" where Petitioner-mortgagor was denied and deprived of the opportunity to submit material and essential facts that she was not in default of the mortgage terms of the contract, and that she suffered damages as a result of the wrongful foreclosure where she was not in default and no debt was established, and that the judiciary permitted enforcement of an illegal contract by Sheriff's sale for the purose of taking Petitioner's property, is State action involved under color of law and has Petitioner been deprived of her right to a trial by jury guaranteed by the Seventh and Fourteenth Amendments to the Constitution of the United States on the grounds that the erroneous facts judicially noticed effected the wrongful foreclosure where mortgagor was not in default and mortgagor was not permitted to present said erroneous judicial notice to the jury and thus Petitioner has been denied the opportunity to present facts on a theory of recovery of damages so wrongfully sustained by the wrongful foreclosure where the court permitted the mortgagee to proveed on the wrongful foreclosure?

STATEMENT OF THE CASE

This case has been pending and tossed around in the Michigan State courts for over nine (9) years. The gist of Petitioner's claim, which the Michigan State courts have deliberately evaded, is that, as mortgagor, she was not in default under either the mortgage terms of contract or any separate agreement between the mortgagor and mortgagee and that Petitioner has never had her day in court on the wrongful foreclosure. This lamentable situation could aptly be called "The Case of the Intentional Wrongful Foreclosure." While the law implies for every wrong there is a remedy, the Michigan State courts have denied your Petitioner the right to be heard, and therefore, have denied due process and equal protection of the law. No right of foreclosure exists in the absence of default by a mortgagor under the mortgage or some separate agreement or under statute. In fact, it was a premature, precipitous and malicious foreclosure before the mortgagor refused to pay "escrow."

This case involves the question of the validity of the action of the Michigan State courts, where the Sheriff's office stands ready to enforce an illegal foreclosure on an illegal contract, while the State courts deny the right to be heard and deny relief or remedy from an illegal or wrongful foreclosure under the theory that parties have a right to private contract and that state action is not involved, even where State assessment of real property taxes are involved, denying due process and the equal protection of law, allegedly reasoning that a mortgagee (lending institution) may flagrantly breach its own contract by failure to perform conditions of said contract and take the property where the lending institution solely has violated the contract.

Further, this case involves judicial notice of certain material erroneous facts essential to the court's decision and drawing inferences in favor of Respondents from the erroneous facts thus judicially noticed to support a theory of "the foreclosure was licit" where in the record there is an abundance of proof to the contrary. This case also involves the question of Petitioner being deprived of her right to have all of the facts presented and inferences to be drawn therefrom, where the court has taken judicial notice of facts in lieu of proof, for final determination.

Petitioner, mortgagor herein, further claims that she had the right to revoke, repudiate or rescind certain terms of the mortgage covenant and agreement because of mortgagee's flagrant and abusive failures to voluntarily adhere to the terms and conditions of said mortgage covenant as prepared by said mortgagee and inflicted upon mortgagor, your Petitioner herein.

Where the mortgagee flagrantly violated conditions of said mortgage covenant, it should be obvious to the courts and to everyone concerned that the foreclosure could have been avoided by such reasoning to the effect that a title-holder of property has the right to pay her own liabilities for taxes and insurance, rather than to pay "escrow" moneys to the mortgagee-lending institution to be mishandled, misused, invested for profit and gain to the benefit of the mortgagee only, and for self-dealing purposes, all in breach of the mortgage agreement.

The Michigan Supreme Court has erred in certain facts, as appearing in their published decision, from which Petitioner seeks review. For over-

whelmingly cogent reasons to be subsequently advanced in Petitioner's argument herein, Petitioner challenges vehemently the propriety, legality, and constitutionality of the ruling that "the foreclosure was licit" on the record presented in this case.

Material to the precise wrong decision of the Michigan Supreme Court are issues raised by this petition and which are matters of record which cannot be honestly disputed and controverted by the Respondents, as follows:

1. On April 26, 1968, mortgagor orally requested that she be released from paying "escrow" to mortgagee, and then by mortgagor's payment made and received on April 30, 1968, mortgagee applied $82.19 to mortgagor's escrow account which was the amount required by mortgagee. Subsequently, while mortgagor was waiting for mortgagee's answer to her request for a release from paying escrow, mortgagee instituted foreclosure by advertisement dated May 23, 1968, without any prior notice, during the period of 15 days from May 15 through May 30, 1968, where, by the terms of the mortgage note mortgagor could make her current May 1968 payment without penalty or late charge. Her May 1968 payment for principal and interest was made on May 29, 1968, which mortgagee refused because of the foreclosure already commenced on May 23, 1968, and said foreclosure pertained to "escrow" moneys only, not the debt or indebtedness. Where mortgagee was so hot and heavy to foreclose on "escrow" only, the court should not overlook the fact that mortgagee did credit mortgagor with additional principal

on April 30, 1968, together with regular principal and interest, which means that mortgagee required only $82.19 escrow for said current April payment.

2. Respondents (mortgagee herein) commenced the precipitous and premature foreclosure unjustifiably by malice in law, as an ulterior motive of attempting to conceal their own wrongdoings with mortgagor's escrow funds, even after applying $82.19 to mortgagor's escrow account from the current payment for April, 1968, made by mortgagor which included prepaid principal. This $82.19 as an amortized amount was all that mortgagee required for said current payment, and therefore, the escrow account was currently maintained, as paid by mortgagor. The Michigan Supreme Court erroneously said "Plaintiff admits in her brief that she did not maintain a current escrow account." Plaintiff-mortgagor was never furnished with receipts for any expenditures made from her escrow account and it was not plaintiff's bookkeeping burden -- it was defendant-mortgagee's burden. Wherein reference is made to Plaintiff's brief, in the Michigan Supreme Court decision, Plaintiff was being jokingly sarcastic, and the inferences drawn should have been that in May 1968 mortgagee required an excessive amount of $401.03, contrary to the wording of the contract, that would not be properly needed as an expenditure until 1969, about 6 or 7 months later, and in the meanwhile mortgagor would also be paying escrow amounts by monthly installments during the same period beginning May 1968 to sometime in 1969, if mortgagee had not

precipitously foreclosed the mortgage.

3. That the intentional wrongful foreclosure was an exertion unauthorized by the terms and conditions of the mortgage covenant and the mortgage note, in violation of Michigan statutes MCLA 600.3201, et seq., MSA 27A.3201, et seq., absent of probable cause, and which Petitioner was prevented and barred from presenting proof and evidence to the judiciary on September 6, 1968, and then again barred from presenting proofs to a jury in August 1973 that she was <u>not in default</u> of the mortgage contract. Where plaintiff-mortgagor was refused the right to be heard, the court theorized that the matter of foreclosure had been decided and that she could not be heard unless the foreclosure were set aside.

4. That the foreclosure because of disputes between mortgagor and mortgagee as to "escrow" moneys was illegal and contrary to law and in violation of federal regulations promulgated by the Federal Home Loan Bank Board, and under the Home Owners Loan Act of 1933, as amended, and repugnant to sound business practices, inter alia.

5. That the mortgagee commenced foreclosure proceedings by advertisement, in the absence of a demand for the debt, prior to mortgagor's refusal to pay escrow, contrary to the decision of the Michigan Supreme Court, and further, your Petitioner has been denied the opportunity to be heard on said foreclosure matter.

In short, the Michigan Supreme Court has sustained the lower courts' opinions because of erroneous facts upon which the court opinions were based, and the theory itself has never been presented to the judiciary or to a jury, for the simple reason that the judicially noticed erroneous facts from which the court drew its conclusions were not before the court, in any event. Petitioner was not apprised of the theory that "she refused to pay escrow" and, of course, she has never had an opportunity to contest, by proof, the truth and notoriety of such facts judicially noticed or any inferences to be drawn therefrom. Further, Respondents did not plead this theory of "she refused to pay escrow" and did not introduce any proofs to support it. If Respondents case was based upon this theory of "she refused to pay escrow" or that there may have been evidence of some negligence for which Petitioner should be held answerable, Respondents failed to introduce such contentions to enable Petitioner to controvert the new theory first advanced in the Michigan Supreme Court decision and judicial notice of "she refused to pay escrow," and that theory is contrary to the facts and evidence supported in the record whereby Petitioner never failed to pay escrow each and every month by installment payments to mortgagee (Respondents herein) prior to the commencement of Respondent's foreclosure by advertisement, precipitously instituted by the mortgagee in the absence of default by mortgagor. Respondents applied Petitioner's moneys for the current April 1968 payment and then foreclosed by advertisement on May 23, 1968, during the period when mortgagor could make her current May 1968 installment payment. Petitioner refused to pay escrow after the foreclosure was published, not before.

The theory that Respondents have advanced, whether or not they admit it, is, in fact, "let's foreclose and force her to continue to pay escrow or she will lose her property entirely" as sanctioned by the court, in abuse of process. Further, that is the theory which the Michigan courts have advanced in their decisions, and resulting in victimizing your Petitioner. The court should not be permitted to change the facts by avoiding dates and simple arithmetic.

The intentional wrongful foreclosure on real property mortgaged when mortgagor was not in default occurred under the circumstances as follows:

Priorly, but particularly on April 26, 1968, mortgagor had complained to mortgagee that they had repeatedly failed to pay mortgagor's taxes and insurance "when due" under the terms of said mortgage contract. Further complaints by the mortgagor were that mortgagee failed and neglected to furnish receipts for disbursements from the escrow account; mortgagee never requested a "deficiency" per se according to the language of the contract, if any deficiency existed, but mortgagee had required excessive "escrow" amounts labeled as "shortage of requirements" contrary to the wordings in said mortgage contract and in violation of the terms of said contract, which mortgagor had disputed. Further, mortgagee had failed to credit mortgagor's principal balance with escrow funds not utilized for payment of taxes or insurance in a twelve-month period; mortgagee had invested said "escrow" funds and profitted by interest earned in violation of the terms of said mortgage contract, among other things.

On said April 26, 1968, mortgagor requested

that she be given a release, in writing, from the "escrow" clause of the mortgage contract to enable her to pay her own taxes and insurance directly rather than into "escrow" for the mortgagee to mishandle, convert and self-deal. While waiting for mortgagee's answer, mortgagor spoke to the Chairman of the Board of Directors of Metropolitan Federal Savings and Loan Association, a Mr. McClintock, who told mortgagor that it didn't matter if her taxes were in default. Previously, when mortgagor spoke to other members of said association, when mortgagor complained about her taxes not being paid "when due" she was yelled and screamed at in the following words: "What the hell do you care when we pay the taxes?" and to which this mortgagor replied, "I care. I care. That's my money and my liability." Also, when this mortgagor asked for receipts to substantiate whatever sums mortgagee required for "escrow" and mortgagor told the President of "Metropolitan" that even the milkman gives receipts, said President of said association replied "If we were in the milk business, we would give receipts." Further, said President of said association wrote your mortgagor a letter saying receipts are not available and that even if receipts were furnished to this mortgagor she would not understand them.

Mortgagor's installment payments were timely paid and all current through and including May 14, 1968, with the last payment made on April 26, 1968, and confirmed by letter from the mortgagee as accepted and allocated as follows:

Principal and interest	$103.81
Escrow (as estimated by mortgagee)	82.19
Additional principal	10.17
Total current installment credited to mortgagor	$196.17

During the term of the mortgage, mortgagor had considerably prepaid on the principal. From July 29, 1963, through and including May 14, 1968, there were 56 monthly installments due and paid by mortgagor to mortgagee; indeed, mortgagor had prepaid on the principal to the extent of 130 amortized monthly amounts during said 56 months, together with interest and "escrow" payments each and every month without fail. By exercising her privilege to prepay, mortgagor had reduced the principal balance from $16,500.00 to $12,041.91 in less than five (5) years, prior to the foreclosure date of May 23, 1968.

The terms of the mortgage note allowed this mortgagor to make installment payments between the 15th and 30th of any month without a penalty or late charge, and as also indicated on the computer payment cards furnished by mortgagee to mortgagor, stating "After the 30th add late charge." Mortgagee refused to credit mortgagor with her installment payment made on May 29, 1968 but never returned mortgagor's check to her and for the reason that mortgagee had already commenced the foreclosure proceedings by publication on May 23, 1968.

Mortgagee never requested mortgagor to pay a "deficiency," in "escrow" if any existed, and in the absence of any receipts, which mortgagee refused to furnish, there were repeated disputes between mortgagor and mortgagee as to their method of doing business and computing "escrow" in excessive amounts and mortgagee's failure to adhere to the terms of their own mortgage contract, and failing to pay taxes when due.

On July 29, 1963, mortgagor, Virginia Cramer, was required to sign an illegal contract as a condition precedent to obtaining a mortgage loan.

The said mass contract contains restrictive covenants inhibiting a mortgagor from complying with "laws, ordinances, regulations or requirements of any governmental authority applicable thereto," and further inhibits mortgagor from abstaining from the commission of waste, such as paying taxes which are due when assessed on said real property.

Together with executing the mortgage contract, between mortgagor and mortgagee, on July 29, 1963, the parties executed a "Loan Settlement Statement" which itemized the monthly payments as follows:

Principal and Interest	$103.81
Tax Escrow	22.25
Insurance Escrow	4.00
MGIC (Mortgage Guaranty Insurance Corp.) Premium	3.44
	$133.50

The mortgage note, in the amount of $16,500.00 provided for a monthly payment of $103.81, constituting principal and interest, and made no mention of any other amount for escrow or mortgage insurance premium. The mortgage contract is absent of any provision for mortgage insurance on the loan, as distinguished from (casualty or hazard) "insurance on the premises."

Upon the execution of the mortgage covenant and agreement the payment of taxes and insurance when due is the burden of the mortgagee who selected and prepared the instrument.

The mortgage note is as follows:

"For value received, the undersigned, jointly and severally, promises to pay to Metropolitan Federal Savings and Loan Association, or order, at its office in

the City of Detroit, Michigan, the principal sum of Sixteen Thousand Five Hundred and No/100 Dollars ($16,500.00) with interest from date on any part thereof at any time unpaid at the rate of 5 & 3/4 per centum (Five & 3/4%) per annum while there is no default hereunder, or under the mortgage securing this note, and at the rate of seven per centum (7%) per annum during the period of any such default, as follows: One Hundred Three and 81/100 Dollars ($103.81) on the 15th day of September, 1963, and a like sum on the 15th day of each calendar month thereafter until the entire indebtedness secured hereby has been paid in full.

"In the event of default in any promise made in this note, or in the mortgage securing it, the holder of this note and said mortgage may, without notice, at its option, declare the entire indebtedness evidenced and secured thereby due and payable, then or thereafter, as said holder may elect, regardless of the date of maturity. Protest, presentment, demand and notice of non-payment are hereby waived by every signer or endorser hereof.

"The monthly payments herein provided for shall be applied first upon interest and the remainder upon principal.

"Privilege is reserved to prepay, without premium or fee, the indebtedness in whole, or in an amount equal to one or more monthly payments on the principal that are next due on this note, on the 15th day of any month prior to maturity, provided that the monthly payment due on the said 15th day of the month shall have been paid. At its option, in lieu of increasing the rate of interest as above provided during the period of any default, the association may collect a "late charge"

not to exceed an amount equal to four per centum (4%) of any installment which is not paid within fifteen (15) days from the due date thereof, to cover the extra expense involved in handling delinquent payments.
(Signed) Virginia Cramer (L.S.)"

The mortgage included the following terms:

"Mortgagor covenants and agrees:

1. To pay to mortgagee at its office in the City of Detroit, Michigan, the principal sum of Sixteen Thousand Five Hundred and No/100 dollars, ($16,500.00) with interest thereon, according to the terms of a promissory note bearing even date herewith executed by mortgagor to mortgagee, which matures on the 15th day of August, 1988, and to pay when due any additional sums which mortgagor may now or hereafter owe mortgagee, as aforesaid.

2. In order more fully to protect the security of this mortgage, in addition to the monthly installments of principal and interest, to pay mortgagee an installment of the taxes and assessments levied or to be levied against said premises that will next become due, an installment of the premium or premiums that will next become due to renew the insurance on said premises (as hereinafter provided) and, if any life insurance is payable or assigned to mortgagee as additional security for said indebtedness, an installment of the premium or premiums that will next become due thereon. The said installments shall be equal, respectively, to the taxes and assessments next due and the premium or premiums for such insurance, as estimated by mortgagee, less all sums already paid therefor, divided by the number of months to elapse before one month prior to the date when such taxes, assessments and premiums will become due, such sums to be held by mortgagee, without interest thereon, to pay said taxes, assessments

and premiums when due. All payments for principal, interest, taxes, assessments and premiums shall be added together and the aggregate amount thereof shall be paid by mortgagor to mortgagee each month in a single payment. If the sums so deposited shall not be sufficient to pay the taxes, assessments and premiums when the same become due, mortgagor agrees to forthwith pay to mortgagee the amount of the deficiency, and if said deposits shall exceed the amount actually paid by mortgagee therefor, the excess shall be credited upon principal.

3. To keep all insurable property covered hereby insured against loss by fire and such other hazards as may be specified by mortgagee from time to time, in such amounts and for such periods as may be required by the mortgagee, and to pay when due all premiums on any such insurance in the manner above provided. All insurance shall be carried in companies approved by mortgagee and the policies and renewals thereof shall be held by mortgagee and have attached thereto loss payable clauses in favor of and in form acceptable to mortgagee. Each insurance company concerned is hereby directed to make payment for such loss to mortgagee only, and the insurance proceeds, or any part thereof, may be applied by it upon any indebtedness secured hereby or to the restoration or repair of the property damaged, at its option, and any surplus shall be paid to mortgagor.

4. To pay when due all taxes, assessments and other charges which are now or shall hereafter be a lien against said premises, or any part thereof, and for which provision has not been made hereinbefore.

5. To keep all property covered hereby in good repair and condition, to comply promptly with all

laws, ordinances, regulations or requirements of any governmental authority applicable thereto, and to abstain from the commission of waste.

6. Should any default be made in the covenants or conditions hereof, mortgagee may, without demand or notice, pay any taxes, assessments, premiums or liens required to be paid by mortgagor, make repairs, effect any insurance provided for herein, cause the abstract of title and tax histories of said premises to be certified to date or procure new abstracts of title and tax histories in case none were furnished to it and procure title reports covering said premises to be certified to date or procure new abstracts of title and tax histories in case none were furnished to it and procure title reports covering said premises, and the sums paid for any one or all of said purposes shall from the time of the payment thereof be due, with interest thereon at the rate of seven per centum (7%) per annum, and shall constitute a further lien upon said premises under this mortgage. In the event of foreclosure the abstract or abstracts of title shall become the property of mortgagee.

7. The failure of mortgagor to pay any taxes or assessments levied against said premises, or any insurance premiums upon policies of insurance covering said premises, in accordance with the terms hereof, shall constitute waste.

8. In the event of default in the payment of said indebtedness, or any part thereof, or in the performance of any of the covenants or conditions hereof, mortgagee may, without notice, at its option, declare the entire indebtedness secured hereby due, then or thereafter, as it may elect, regardless of the date of maturity and is hereby authorized and empowered to sell or cause to be

sold said premises, pursuant to the statute in such case made and provided, and out of the proceeds of the sale to retain the sums then due hereunder, and all costs and charges of the sale (including the attorneys' fee provided by statute), rendering any surplus moneys to mortgagor. The commencement of proceedings to foreclose this mortgage in any manner authorized by law shall be deemed an exercise of the above option.

9. The covenants and conditions hereof shall bind, and the benefits and advantages thereof shall inure to, the respective heirs, executors, administrators, successors and assigns of the parties hereto. Whenever used, the singular number shall include the plural, the plural the singular, and the use of any gender shall be applicable to all genders.

In Witness Whereof, this mortgage has been signed and sealed by mortgagor. Signed, sealed and delivered in the presence of:
Frank E. Fike
Edward J. Gilroy Virginia Cramer (L.S.)"

During the period of almost five (5) years of the mortgage, prior to the foreclosure dated May 23, 1968, the mortgagee disbursed from "escrow" funds for taxes and insurance as follows:

1963-64 Wayne County taxes due in December, 1963, in default and delinquent with penalty and interest accrued, paid in January 1965. (No taxes paid in 1964.)

1964-65 Dearborn Heights City taxes due in July 1964, in default and delinquent with penalty and interest accrued, paid in January 1965. (No taxes paid in 1964.)

1965-66 Dearborn Heights City taxes due in July 1965, in default and delinquent with penalty, paid October 21, 1965.

1967-68 Dearborn Heights City taxes due in July 1967, in default and delinquent with penalty, paid August 18, 1967.

Also, the hazard insurance was paid 3 months late because Mr. Gilroy of Metropolitan repeatedly said it was paid and that he had a receipt; however, it was not paid until November 4, 1963, (app 688a) where it was due in August 1963. Further, the MGIC premium for mortgage insurance on the loan, due in August 1968 was not received by Mortgage Insurance Guaranty Corp. until December 1968, considerably after the foreclosure date of May 23, 1968. (Exhibit 55, dated August 21, 1973)

"Escrow" moneys were timely paid by mortgagor to mortgagee as follows:

		Amount
July 29, 1963, at closing	------ $	619.05
Monthly Installments as Estimated by Mortgagee		
1963 - 4 months @ $29.69	------	118.76
1963 - 3 years prepaid Haz. Ins.	--	144.00
1964 - 12 months @ $29.69	------	356.28
1965 - 2 months @ $29.69	------	59.38
1965 - additional escrow	------	243.00
1965 - 10 months @ $43.19	------	431.90
1966 - 12 months @ $43.19	------	518.28
1967 - 2 months @ $43.19	------	86.38
1967 - 10 months @ $46.19	------	461.90
1968 - 2 months @ $46.19	------	92.38
1968 - 1 month @ $50.19	------	50.19
1968 - 1 month @ $82.19	------	82.19
		$3,263.69

In Michigan, taxes are billed and payable in advance. For example, taxes assessed and billed in December are payable in December and cover the following 12 months of each year. Late penalties or interest on delinquent taxes commence after February 14 of each year for taxes assessed and billed in December.

Mortgagee (Metropolitan Federal Savings & Loan) instituted foreclosure by advertisement dated May 23, 1968, during the period whereby mortgagor's current monthly May 1968 payment would be due, from May 15 through and including May 30, 1968. (see terms in mortgage note) Mortgagee refused to credit mortgagor's check for payment tendered on May 29, 1968, which said check was never returned to mortgagor, and mortgagee refused mortgagor's June 1968 and July 1968 payments timely tendered and which said June and July payments were returned to mortgagor. These three (3) payments, for May, June and July 1968 were for principal and interest only. The last check dated April 26, 1968, prior to the foreclosure date of May 23, 1968, included "escrow" of $82.19, additional principal of $10.17, and regular principal and interest of $103.81, as allocated by mortgagee, totaling $196.17, which was accepted by the mortgagee and was the current payment for April 1968. (Exhibit 8, 8-21-73)

Early in 1965, mortgagor-Virginia Cramer had begun a regular monthly pattern of prepaying principal by doubling or tripling principal payments and she continued this prepaying each and every month, together with payments of interest and "escrow" as estimated by mortgagee, until when her current May 1968 payment became due. Because of mortgagee repeatedly failing to pay taxes when due, failing to furnish mortgagor with receipts to substantiate alleged disbursements from the "escrow" funds and alleged

"shortage of requirements" (not a deficiency) in dispute as excessive requirements, mortgagor was waiting for mortgagee's answer as to allowing mortgagor to pay her own taxes and insurance and submitted her current monthly payment on May 29, 1968, for principal and interest only. (Exhibit 33, 8-21-73) This was the first monthly installment made to mortgagee, in the entire history of said mortgage, which did not include "escrow". All other monthly installments mortgagor had made to mortgagee included escrow as estimated by the mortgagee, with principal and interest, and the majority of said payments included additional prepaid principal, prior to foreclosure date of May 23, 1968.

Mortgagee foreclosed by advertisement on May 23, 1968, with no prior notice of demand for tender as to their intention to foreclose.

There was no deficiency in mortgagor's "escrow" account and mortgagee made no demand for any deficiency. Instead, by telephone, mortgagee had requested a "shortage of requirements" which said wordings are not contained in the mortgage covenant and agreement. (Exhibit 33, 8-21-73)

Under post-mark date of February 20, 1968, mortgagee notified mortgagor that her escrow account was adequate. (Exhibit 68, dated 8-21-73) Said notice increased mortgagor's monthly installment payment to $154.00 principal, interest and escrow, which mortgagor paid to mortgagee in her regular current payment for March, 1968.

Under post-mark date of April 18, 1968, mortgagee sent to mortgagor a set of computer cards and "Notice of Payment Change" showing the monthly installment increased to $186.00 per month, with the only change from previous computer cards

being in the escrow total amount. On April 26, 1968, mortgagor visited mortgagee's offices, personally, because of a letter mortgagee wrote in response to her request for receipts for disbursements of escrow, where in said letter mortgagee refused to furnish receipts, and mortgagee further said: (Exhibit 1, 8-21-73)

> "We are unable to send you receipts, as they must be kept in the file. Even with the receipts you would still probably have difficulty in fully understanding all of the transactions."

In the interim, between April 26, 1968, and May 15, 1968, mortgagor spoke to various and several people connected with Metropolitan Federal Savings & Loan regarding mortgagee's failure to pay taxes when due with mortgagor's escrow funds, and also attempting to resolve disputes as to excessive "escrow" amounts, and this mortgagor was yelled at in the following words: "What the hell do you care when we pay the taxes?" Mortgagor replied, "I care. I care. That's my money and my liability." Further, on April 27, 1968, mortgagor was told by the Chairman of the Board of Directors of Metropolitan Federal Savings & Loan that it didn't matter if the taxes were in default.

During the entire history of this mortgage loan, while paying escrow moneys to mortgagee each and every month, mortgagee never furnished any receipts to mortgagor, and mortgagor never saw any tax bills as assessed in her name as title-holder of said property, and mortgagor never saw any billings for insurance in her name. By then, mortgagor was convinced that she was paying escrow moneys blindly at the whim and fancy of mortgagee, where mortgagee was refusing to provide anything to substantiate said escrow as estimated by mortgagee.

Mortgagor received no answer from mortgagee as to her request to pay her own bills with her own money, and instead mortgagee foreclosed by advertisement dated May 23, 1968, during the period of 15 days where, according to the terms of the mortgage note, no penalty or late charge would be applicable. Mortgagor tendered her current May 1968 installment on May 29, 1968. Mortgagor found the newspaper clipping thumb-tacked to her front door-sill on June 1, 1968. Mortgagee's affidavit states that said posting on the premises was made on May 31, 1968. Said newspaper clipping made no mention of any "debt" or "indebtedness" but instead reads in part as follows:

> "Notice of Mortgage Sale * * * Default having been made in the conditions of a certain mortgage made by VIRGINIA CRAMER to METROPOLITAN FEDERAL SAVINGS AND LOAN ASSOCIATION * * * on which mortgage there is claimed to be due at the date of this notice (May 23, 1968) the sum of $12,519.37, and an attorney's fee as provided for in said mortgage, and no suit or proceedings at law having been instituted to recover the moneys secured by said mortgage, or any part thereof. * * * "
> (emphasis added)

The balance on the mortgage loan as of said date of May 23, 1968, was $12,041.91 less any surplus "escrow" funds as paid to mortgagee by mortgagor. Thus, mortgagee foreclosed by advertisement for "escrow moneys" only, and accelerated the debt, in the period where mortgagor's current monthly May 1968 payment would become due.

The foreclosure figure of $12,519.37 includes amounts as follows:

"Escrow moneys" for future taxes and insurance, not yet billed and not yet assessed ---------	$ 401.03
Interest, at 7% contrary to note	76.43
Principal balance	12,041.91
Published foreclosure amount	$12,519.37

Prior to finding the newspaper clipping of foreclosure entitled "Notice of Mortgage Sale", mortgagor wrote and mailed to mortgagee a letter on May 31, 1968, as follows:

"Metropolitan Federal Savings & Loan,
Attention Mr. Richards, President:

"Since I appeared personally in your office during the latter part of April, 1968, I have taken upon myself the task of further analizing my account (01-04-6326) and I find various and several irregularities which indicate, conclusively, that there is ample justification for my requesting that you execute a Release in order to permit me to make such necessary disbursements for taxes and insurance, with my own funds, rather than deposit escrow monies in your trust.

"Some of these irregularities are as follows:

"In 1967 you defaulted and paid the Dearborn Heights city taxes 1-1/2 months delinquent which involved a penalty.

"In 1966 you failed to pay the hazard insurance when due and thereby jeopardized the insurance protection on this property.

"In 1965 you defaulted and then paid the city taxes almost 3 months delinquent which involved a penalty.

"In 1964 you defaulted and then paid the 1963 Wayne County & school taxes in January 1965, more than 1 year delinquent which involved a penalty and interest charges.

"In 1964 you defaulted and then paid the city taxes approx. 7 months delinquent which involved a penalty. You then neglected and failed to pay any other taxes which were overdue and delinquent in 1964, even though there showed on your statement an escrow balance of $513.92, accumulated since July 1963.

"In 1963 you defaulted and paid the hazard insurance more than 3 months delinquent which jeopardized the insurance coverage on this property.

"In 1965 you had demanded that I pay you $938.28 per year in escrow in order for you to disburse the required amount of less than $500.00 in taxes and insurance.

"In 1968, you are demanding that I pay you $986.28 per year in escrow in order for you to disburse the required amount of less than $600.00 in taxes and insurance.

"Your 1967 year-end statement shows only a total of $372.64 as year-to-date interest when, in fact, I had paid a total of $765.52 interest for the year 1967.

"Your 1967 year-end statement also shows erroneously the principal balance of $12,500.82 when, in fact, the principal balance was $12,498.93 according to the "Schedule of Direct Reduction Loan" which has been the basis of which I have made my regular payments to your office since the

acquisition in July 1963. At the time of the closing on July 29, 1963, it was stated to me by your Asst. Vice-President, Mr. Gilroy, that I would be furnished receipts for all disbursements involving the "closing costs" of $619.05 and escrow monies paid into the account. To date, your office has failed and neglected to do this even though I have requested receipts various and numerous times.

"I have further made requests for receipts from your Mr. Lonnerstater, Asst. Vice-President, your Controller (name unknown), your Mr. Denyer and a Miss Corr, each, respectively, from time to time. Also, I have requested of you, Mr. Richards, that I be furnished with these receipts. All of my requests have been ignored by your entire organization.

"Also, I believe, under the circumstances, I am again justified in refusing to pay for any insurance which you claim you have delegated yourself as the sole "beneficiary" and it seems that it would be incumbent upon you, yourself, to pay for such insurance if you desire to be the sole beneficiary for same. Further, you have never furnished me with either a Certificate of Insurance or a copy of the Master policy and thereby it constitutes your liability therefore, since I have not been permitted to examine the insurance policy, if any there exists. There is a matter of $232.40 to date which you have erroneously charged me with as insurance premiums for an insurance policy which is non-existent, to my knowledge.

"Also, you have failed and neglected to substantiate a charge of $115.00 which I paid as "title charges" when the title policy payment to the abstract and title company was $24.00 in total.

"Further, I am at a loss to determine why you are

periodically demanding approximately $350.00 or more in escrow monies in excess of the amounts you may need to meet the disbursements of taxes and insurance, especially since you are to hold the escrow monies "without interest thereon" as specified in the terms of the Mortgage agreement. Further, I am not conducive to your threats of foreclosure if I do not accede to your unreasonable demands of paying excessive escrow monies, especially since I have most diligently performed in accordance with the mortgage terms in all other aspects; that is to say, up until I made my last regular payment (May 1968 current payment) to you which I designated as interest and principal only. I believe that I, as Mortgagor, have diligently performed in accordance with the mortgage terms so as to protect both your interests and mine, but the above list of various and numerous irregularities shows conclusively that your performance has been negligent, so as to jeopardize the security of the title holder, and questionable as to intentions in the conditions as Mortgagee. It appears that your performance, as listed above, constitutes waste and incompetency to handle escrow funds.

"As you can readily see, I have reduced the principal balance, as I am privileged to do, from $16,500.00 to less than $12,000.00 in the period of less than 5 years, which is approximately less than one-half of the time with respect to the date of maturity of the mortgage note. You cannot argue the fact that my performance has met with every & all conditions of the mortgage, except to pay you the excessive escrow monies upon your demand. Your Loan Servicing Manager, Mr. Denyer, has literally screamed at me on the telephone that I must hire a bookkeeper and a lawyer, when it appears to me that the possible opposite is true. Your Controller has made admissions to me that the interest column

year-to-date figure needs further talents in simple arithmetic, which obviously your office shows the absence of.

"I am of the opinion, so far, that your intentions are not in good faith when you overlook such aspects and consequences which your office personnel is at fault in creating and then to threaten me with foreclosure unless I tolerate the created conditions which are your fault. These tactics appear to be reminiscent of forms of extortion and/or violation of trust, at least.

"I am sure you will have to agree that previously I have paid amounts to you in addition to the stipulated monthly escrow amounts where ever there was a need shown. I did this unhesitatingly and unreluctantly because I am fortunate enough to be one of those persons who can add 2 and 2 and arrive at 4. Further-more, if my figures were ever in error, it is for your office only to draw my attention to such, and not to scream at me that I should hire a bookkeeper and a lawyer. I am of the impression that the escrow monies are entrusted to you and that it is incumbent upon you to have a proper bookkeeping staff to properly account for same; not the reverse so that I have to do your bookkeeping for you. Please correct me if I am wrong in this.

"Further, I am of the opinion that all reasonable people are able, through communication, to arrive at some degree of mutual understanding between themselves, if all parties are acting in good faith, and then there would be no necessity of legal proceedings in any manner provided by law. I do not relish being put in the position of questioning your intentions and trust; however, you leave me with no other alternative in the light of your past performance, unless, of course, I hear from you to the contrary by return mail.

"You should bear in mind, that since you are experiencing considerable difficulty in making the necessary disbursements timely from the escrow account (as shown herein on page one) I stated to you, in your office, that I wish to pay the taxes and insurance directly to those persons authorized to accept same as they may become due. This will, of course, be to your advantage since you will then be relieved of this bookkeeping burden, and then we will both have the assurance that such payments will be made when due and that there will be no resultant default as there has been in the past, as frequently shown during the period of less than five (5) years when you have defaulted each year.

"Currently, the next disbursement will be due July 1, 1968, for the city taxes; December 1, 1968, for county and school taxes; and the hazard insurance will be due in July 1969. These and any subsequent payments that may become due will be timely paid by me, so as not to constitute waste in accordance with the terms of the mortgage. Also, therefor, I shall continue to pay the required amounts of principal and interest thereon according to the terms of the mortgage note, with privilege to pay additional principal.

"There are no taxes and insurance premiums due or payable according to the requirements of any persons or authorities competent to accept such payments, and therefore, the conditions of the mortgage are not in default. As a matter of fact, I find it most imperitive that I pay the taxes and insurance next due, myself, so that you do not have the opportunity to default in said payments based on your past performance, inasmuch as I am completely in accord with the mortgage conditions, to wit: "and to abstain from the commission of waste." Therefore, I must comply

promptly with all laws, ordinances, regulations or requirements of any governmental authority applicable thereto, and pay the taxes and insurance when due, which you have demonstrated your inability to do so and/or your negligence to do so.

"Thank you for your attention in this matter and awaiting your reply, I am,

Respectfully yours,
Virginia Cramer,
Mortgagor

cc: McClintock, Fulton,
Donovan & Waterman,
Attys. for Mortgagee."

As pointed out above, on June 1, 1968, the newspaper clipping publishing the mortgage foreclosure dated May 23, 1968, with mortgage sale noticed for August 20, 1968, for moneys (not debt) secured by said mortgage, was found by mortgagor Virginia Cramer tacked on her front door-sill.

Subsequently, under date of September 27, 1968, Metropolitan Federal Savings & Loan wrote a letter to Maurice Moule, Assistant Attorney General, Capitol, Lansing, Michigan, stating in part as follows:

"We notified Virginia Cramer of this shortage and gave her the opportunity of paying this shortage in full or amortize it over a 12 month period and add it to her monthly payment.

Principal & Interest payment --	$103.81
Escrow deposit for future requirements ----------	51.80
1/12 of the shortage (previous year) ----------	30.23
Total ----------	$185.64 "

The above letter obviously refers to the computer payment-cards sent to mortgagor, under post-mark date of April 18, 1968, increasing mortgagor's payment to $186.00 as that was the only notice mortgagor received.

Mortgagor's current April 1968 payment was for $196.17 in total and which mortgagee therefrom allocated $82.19 for escrow, but published the foreclosure dated May 23, 1968, during which time mortgagor's current May 1968 monthly installment would become payable under the terms of the mortgage note. Thereafter, mortgagee refused to accept any payments for May, June and July, 1968, timely offered by mortgagor, because no escrow was included in said payments.

Consistently, mortgagee computes the escrow amounts without taking into account "less sums already paid therefor" in violation of the mortgage covenant and agreement, and which results in excessive escrow "requirements", but not termed as a deficiency.

Exhibit 34, dated 8-21-73, shows as follows:

"As of May 10 Metro needs				
6 months	County	at	37.57	$225.42
11 months	M.G.I.C.	at	2.76	30.36
11 months	City Tax	at	7.47	82.17
24 months	Hazard Ins.	at	4.00	96.00
Total requirements ----------				$433.95
Balance in escrow (less)				32.92
Shortage of requirements -------				$401.03
as of 5-10-68 "				

RE: EXCESSIVE ESCROW

Assuming, arguendo, Respondents claim of escrow

to be valid and correct (in the amount of $401.03 which mortgagee foreclosed on) and assuming that mortgagor had paid under threats of foreclosure to avoid foreclosure, the following would have resulted:

	Paid In	Paid Out	Escrow Balance
Alleged balance in escrow May 23, 1968		$	$ 32.92
If mortgagor had paid lump sum "required" by mortgagee ----	$401.03		433.95
Then, May 1968	52.19		486.14
June 1968	52.19		538.33
July 1968	52.19		590.52
M.G.I.C. Premium due		30.10	560.42
City taxes due		101.33	459.09
Then, August 1968	52.19		511.28
Sept. 1968	52.19		563.47
Oct. 1968	52.19		615.66
Nov. 1968	52.19		667.85
Dec. 1968	52.19		720.04
County taxes due		491.09	228.95

Assuming again, arguendo, that mortgagee is permitted to have 1/12 of escrow in their keeping after expenditures, which by their own estimate was $52.19, then mortgagee would have had $176.76 in excessive escrow by the end of the year, if all expenditures were paid when due during said year; and during said year mortgagee would have had as high as $720.04 fattening their coffers to self-deal.

The hypothetical, above and below, are presented to show the unreasonable and bad faith "requirements" of mortgagee who are careful not to require a "deficiency" as worded in the mortgage contract, but label their computations for "escrow" for future taxes and insurance as "shortage of requirements" and then foreclose the mortgage loan if and

when mortgagor disputes said computations.

The following shows how the mortgagee juggles and pyramids the same set of figures (called "cushioning" in the industry) and without taking into account "less all sums already paid therefor" as worded in the mortgage contract, clause 2.:

Est. by mortgagee 24 months escrow paid by mortgagor		Mortgagee requiring excess escrow (cushioning) for prior 24 months as of May 10, 1968			
Date	Amt.	County Taxes	City Taxes	Haz. Ins.	M.G.I.C.
5-20-66	$ 43.19			4.00	
6-20-66	43.19			4.00	
7-25-66	43.19			4.00	
8-26-66	43.19			4.00	
9-24-66	43.19			4.00	
10-26-66	43.19			4.00	
11-18-66	43.19			4.00	
12-13-66	43.19			4.00	
1-23-67	43.19			4.00	
2-17-67	43.19			4.00	
3-15-67	43.19			4.00	
4-17-67	43.19			4.00	
5-16-67	46.19			4.00	
6-19-67	46.19		7.47	4.00	2.76
7-15-67	46.19		7.47	4.00	2.76
8-23-67	46.19		7.47	4.00	2.76
9-25-67	46.19		7.47	4.00	2.76
10-13-67	46.19		7.47	4.00	2.76
11-21-67	46.19	37.57	7.47	4.00	2.76
12-11-67	46.19	37.57	7.47	4.00	2.76
1-16-68	46.19	37.57	7.47	4.00	2.76
2-23-68	46.19	37.57	7.47	4.00	2.76
3-16-68	50.19	37.57	7.47	4.00	2.76
4-26-68	82.19	37.57	7.47	4.00	2.76
		$225.42	$82.17	$96.00	$30.36

Mortgagee foreclosed on the above four columns of "cushioned" figures totaling $433.95 as "shortage

of requirements" as of May 10, 1968, and published the foreclosure for "moneys" (not a debt or not an indebtedness) on May 23, 1968.

On August 12, 1968, mortgagor instituted this suit in defense of the wrongful foreclosure, and obtained a temporary restraining order from the Wayne County Circuit Court. (Appendix A, App. 5)

At the time Mr. Denyer of Metropolitan testified on September 6, 1968, there were no exhibits or proof or evidence produced as to said "requirements" or "shortage" of escrow. The court would not hear Virginia Cramer's (Mortgagor's) testimony and would not allow her to present her proofs in dispute of mortgagee's oral testimony. In fact, the court said:

> "I don't want to hear any more about it. The injunction may be dismissed and they can proceed to foreclose." (Appendix "C") 28

Where vast numbers of mortgagors are afforded "forbearance" considerations in meeting mortgage payments late and delinquent, the most powerfully descriptive words are insufficient to relate the oppression, trauma and fear and shock suffered by your Petitioner by the foreclosure proceedings, where she had an exemplary payment record on her mortgage loan, as well as a general credit-rating to be envied.

Subsequently, Respondents submitted, in the court record, the following set of juggled and pyramided figures which they claim they "needed" as of December 30, 1967, covering the same 18 months of the above-shown 24 months, by the same trickery (called "cushioning"), as follows:

"As of Dec. 30th 1967 Metro needs

1 month County Tax	@ 37.57	$ 37.57
6 months MGIC Prem.	@ 2.76	16.56
6 months City Tax	@ 7.47	44.82
18 months insurance	@ 4.00	72.00
		$170.95
As of Dec. 30 we had a red bal.		191.84
Total shortage ----------		$362.79

Principal & Interest	$103.81
Escrow	51.00
1/12 amt of shortage	30.23
	$185.84
	.16
	$186.00

Pmt if 362.79 shortage is made up in cash

Princ. & Int.	$103.81
Escrow	51.80
	$155.61
	$156.00 "

The following is another set of juggled and pyramided (cushioned) figures, by trickery, covering 28 months back, which is the same period covering the 24 months back and the same period covering the 18 months back, and never taking into account "less the sums already paid therefor" as worded in the mortgage contract, paragraph 2.:

"As of Sept 6th (1968) Metro needs

10 months County Tax	at 37.57	$375.70
3 months MGIC	at 2.51	7.53
3 months City Tax	at 7.47	22.41
28 months Haz. Ins.	at 4.00	112.00
		$517.64
Balance in escrow ---------		2.82
Shortage of "requirements" --		$514.82
As of 9-6-68 (less) ------		100.00
		$414.82 "

Many times, mortgagor asked the mortgagee "Why don't you just ask for the red balance figure (deficiency), if there is any, and then increase the following months' payments accordingly?" But, mortgagee said they couldn't do it that way, and also mortgagee knew that this mortgagor was aware of their juggling and pyramiding of escrow figures, contrary to the terms of the mortgage contract. Therefore, mortgagee foreclosed maliciously by advertisement on May 23, 1968, and refused to take mortgagor's current May 1968 payment.

After the foreclosure was published, mortgagor paid her own taxes directly in July 1968 in the amount of $101.33. Mortgagee prevented mortgagor from paying her own taxes in December 1968 in the amount of $491.09 whereby mortgagee obtained the tax bill and then the taxing treasurer's office refused to take mortgagor's payment for taxes because she could not present the tax bill along with her payment for taxes.

The foreclosure was a crucial element of malice, and evidence of express malice, particularly because mortgagor had, on April 26, 1968, confronted the mortgagee on issues of mishandling and self-dealing with the escrow funds and requiring excessive escrow from time to time.

Priorly, in 1965, mortgagee had written a letter to mortgagor alleging an escrow "shortage" of $464.03 to be paid in one lump sum to keep the payments at $147.00 monthly installment of principal, interest and escrow, where mortgagee's estimate originally had been $133.50 per month, (See Settlement Loan Statement) and which was an underpayment of approximately $13.00 per month for 18 months. However, mortgagor recomputed at $13.50 per month for 18 months and sent mortgagee

$243.00 instead of $464.03. (Appendix 21a)

The court should keep in mind that mortgagor was not furnished any tax or insurance bills and mortgagee refused to furnish any receipts to account for any disbursements made from mortgagor's escrow funds. Therefore, mortgagor had no way of determining what the correct amount of escrowing would be, while said mortgagee solely maintained said escrow accounts based upon solely their estimates. Mortgagee required the local tax authorities and insurance companies to furnish said billings and assessments to mortgagee only, and mortgagor was refused access to said billings, all during the period of the mortgage of almost five (5) years.

While mortgagee was requiring $401.03 in escrow as "shortage of requirements" as their basis for foreclosure in May 1968, there were no taxes due, no insurance due, and none were unpaid. The tax liability of $101.33 due in July 1968 was the only amount due, following the foreclosure, and which mortgagor paid herself in July 1968.

There was no deficiency in mortgagor's escrow account at the time of the foreclosure. Mortgagee had not expended any of their moneys, and in fact, there was a credit or surplus balance in escrow at the time of said foreclosure. Mortgagee's basis for foreclosure was strictly for future payments of taxes and insurance which had not yet been assessed and not yet billed.

Mortgagor commenced this suit on August 12, 1968, to enjoin the foreclosure and to attempt to prevent the wrongful foreclosure and irreparable injury to mortgagor. The Wayne Circuit Court issued a temporary restraining order with an Order to show cause why a preliminary injunction

should not be granted. After only one hearing on September 6, 1968, where only the defendant-mortgagee, Metropolitan, was permitted to testify, the court would not hear Plaintiff-mortgagor and dissolved the temporary restraining order. (Appendix D, App. 28)

Mortgagor herein redeemed her property by obtaining, after much difficulty, another first mortgage with another lending institution at a higher rate of interest.

The Michigan courts stand ready to either enforce or deny relief from illegal contracts under the theory that parties have a right to private contract, even where State assessment of taxes are involved, denying due process of law and the equal protection of the law.

For these reasons Petitioner seeks review of these questions and an Order reversing and remanding the case to be properly litigated to permit Petitioner to exercise her constitutional prerogatives to introduce proofs contesting the truth and notoriety of the erroneous facts judicially noticed, and any inferences to be drawn therefrom, and the opportunity to present these facts in a court of law for the dispensation of justice, heretofore denied to your Petitioner. In fact, by consequential and chronological dates of occurrences as to any transactions involving escrow funds between the mortgagee and mortgagor, positive proof is readily available that mortgagor (Petitioner herein) refused to pay escrow <u>after</u> the mortgagee had initiated the foreclosure proceedings, which Petitioner labels such foreclosure as a fiendish extortion racket by mortgagees who claim fallaciously that they are "bound by law to collect escrow" and then said mortgagee fails to pay taxes when due on the real property mortgaged

from the escrow funds so collected, and instead the mortgagee self-deals with said escrow funds belonging to the mortgagor, where the mortgageee has no title to said escrow funds.

The mortgage contract, a mass contract, which Respondents state consists of the mortgage note, the mortgage covenant and agreement and the supplemental loan statement, is illegal and in violation of federal regulations, 12 CFR 545.6-1 (a) (i) et seq., promulgated by the Federal Home Loan Bank Board, 12 U.S.C.A. 1701, et seq., and 12 U.S.C.A. 1461, et seq.

In the instant case, the mortgage is an insured conventional mortgage loan, and Petitioner alleges that no escrow or prepaid or advance payment of taxes and assessments and insurance is required on any insured or guaranteed loan.

Further, said contract as a restrictive covenant inhibits a mortgagor from complying with "laws, ordinances, regulations or requirements of any governmental authority applicable thereto" since it restricts the mortgagor from paying taxes where the mortgagee fails to pay taxes, and said contract inhibits mortgagor from abstaining from the commission of waste. The mortgage contract inhibits mortgagor, as titleholder of real property, from paying taxes.

The said mortgage contract is designed and intended as a restraint of commerce for the main purpose of mortgagees (lending institutions) to maintain economic power and control, in violation of the Sherman and Clayton Acts, 15 U.S.C.A. Sections 1, et seq.

Mortgagors are victims of entrapment by the lending institutions involving "escrowing" of mortgagors' own funds.

REASONS FOR GRANTING THE WRIT

1. The Michigan Supreme Court has ruled that a mortgagee may foreclose on the mortgagor's own money, for future taxes, not a debt or not an indebtedness, not assessed and not billed, to enable the lending institutions to operate their extortion racket under threats and leverage of foreclosure, without notice, without a hearing, and that the Sheriff (executive office) may rubber-stamp such foreclosure on a mortgage loan, and take possession of the property in deprivation of property rights of mortgagor, where there is no default by a mortgagor.

2. The decision of the Michigan Supreme Court, in the instant case, is disastrous and has far reaching results which undermine the fundamental rights of litigants as property owners invoking jurisdiction of the courts, for the decision would deny litigants the right to be heard while being deprived of property rights by the unfettered,unscrupulous discretionary foreclosures under power of sale, thereby depriving taxpayers and property buyers of the opportunity to be informed of the facts and the theory upon which liability ultimately attaches.

3. The Michigan Supreme Court has decided important questions of issues which the United States Congress could not have intended to vary in the individual several States by local State law. The evidence in this case is in direct conflict with the Michigan Supreme Court decision, and in taking judicial notice of certain material facts essential to its decision, before the whole case is submitted, the Michigan Supreme Court deprived Petitioner of of due process of law under the Fifth and

Fourteenth Amendments to the Constitution of the United States by preventing Petitioner from introducing proof to contest the truth and notoriety of facts judicially noticed and inferences to be drawn therefrom, involving alleged violations under acts of Congress.

4. That the Michigan Supreme Court has decided an important federal question on a theory which has never been brought before a federal jurisdiction and which turns federalism on its head, upside-down, and disrupts all concepts of well established rules of law.

> "A federal claim first raised by petition for rehearing in a state court is in time for purposes of review here if it was raised at the first opportunity, even though the petition was denied without opinion." P. 677
> "The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government." P. 679
> Brinkerhoff-Faris Trust & Savings Company v. Hill, Treasurer and Ex-officio Collector of Henry County, Missouri. 281 US 673

29 Am Jur 2d, Evidence: at 88, Banks --
"The courts take judicial notice of universal customs or business practices in regard to banks and banking matters. For example, to the extent that such customs or practices are commonly known, the courts have taken judicial notice of the customs or practices in regard to interest on deposits; loans, discounts, and investments; bankbooks and bank records, and entries therein; * * *. The courts have also taken judicial notice of customs and practices

in regard to collections. In some cases the question has arisen as to whether courts will take judicial notice of a custom or usage on the part of collecting banks to credit the proceeds of collections and mingle them with their own funds, instead of remitting the actual money or proceeds received. In some instances it has been held that judicial notice will be taken of such custom or usage. * * * The courts will also notice that the exigencies of the banking business require that officials other than the cashier be authorized to have access to the funds of the institution."

29 Am Jur 2d, Evidence: at 90, Meaning of words and phrases. -- "In general, the courts take judicial notice of the meaning of English words and phrases." Sonn v Magone, 159 US 417, 40 L ed 203, 16 S Ct 67; Pennock v Fuller, 41 Mich 153, 2 NW 176. "In this respect, it is not necessary that the meaning of a word or phrase be universal to be judicially noticed; no more is required than that the meaning be general and notorious in a local sense, within the particular jurisdiction of the court." Toplitz v Hedden, 146 US 252, 36 L ed 961, 13 S Ct 70. "Insofar as the courts will take judicial notice of the meaning of English words and phrases, they will take judicial notice of the meaning usually accorded such words and phrases by the average person." Nix v Hedden, 149 US 304, 37 L ed 745, 13 S Ct 881.
"Whether or not the courts will take judicial notice of particular facts regarding mental illness and the effects thereof has been considered in a number of cases. The view taken by some courts is that judicial notice will not be taken of the fact that a specific type of insanity is of an hereditary character, since

there are many and varied causes of insanity."

Re Cornell, 111 Vt 454, 18 A2d 151, wherein the court took judicial notice that an insane person may often become sane at a later time.

In Eagle v Peterson, 136 Ark 72, 206 SW 55, 7 ALR 553, the court took judicial notice that many persons who are insane at a particular period are subsequently restored to their right mind * * * commenting that such cases are not unusual, and that the return of reason may be anticipated when the cause for the insanity has been removed.

29 Am Jur 2d, Evidence: at 121. Customs and usages. -- "The courts take judicial notice of the customs and usages of man which are generally known." Waters-Pierce Oil Co. v Deselms, 212 US 159, 53 L ed 453, 29 S Ct 270. "or accepted to an extent sufficient to make them matters of common knowledge." United States v Ferger, 251 US 207, 63 L ed 941, 39 S Ct 447. "In other words, the existence and application of customs and usages which are of such notoriety and of such long standing as to have become a part of the law itself, particularly the customs and usages of business, are judicially noticed by the courts. * * * "

5. The Michigan Supreme Court's departure from sanity and common sense requires the exercise of this Court's supervisory powers to correct the decision in the interests of uniformity under federal law, procedure and practice.

"We granted certiorari because of the importance of the jurisdictional issue involved." Bell v Hood, 327 US 678

6. That the Respondents herein initially raised the federal question, specifically, that they are bound by law under federal regulations to require and collect "escrow" funds for future payment of taxes and insurance on mortgage loans, and that further, specifically, they are bound to do nothing with such "escrow" funds belonging to mortgagors.

7. That the Federal Home Loan Bank Board regulations do not contain any escrow requirement as to insured or guaranteed loans.

8. That in Michigan, we do not have a system of law; we have a system of corruption, particularly in the legal system, and this Court's supervisory powers are desperately and urgently needed, mainly because of the self-interest-conflict of interest within the legal system operative in destruction of the law and the cancelling-out of the meaning of law. Under these conditions there is no opportunity for our civilization to progress. In fact, we are going backwards instead of advancing. Thus, while regressing at this rapid pace, as long as it makes money for lawyers, our Michigan courts do not care.

* * * * * * * * * * *

ARGUMENT

1. Where the Michigan courts, before submission of the case, on a suit to enjoin a wrongful foreclosure by advertisement, allows the testimony of defendant-lending-institution to be heard and refused to hear any of plaintiff-mortgagor's testimony of certain material facts essential to its decision and said court takes judicial notice of erroneous material facts not appearing in the record and no proofs presented and finds your mortgagor-Petitioner in default of a mortgage, or that she "refused to pay "escrow" and where no debt was established and allows the mortgagee to proceed with the foreclosure when, in fact, mortgagor was not in default of said mortgage which is easily proven by sequential dates of occurrences and performances of both mortgagor and mortgagee, and which the Michigan courts refused to hear as testimony, and without any party requesting the said court to take judicial notice of anything as a substitute for proofs of the facts, and where the erroneous facts thus noticed and the inferences drawn therefrom by the Michigan Court of Appeals and the Michigan Supreme Court support a new theory of a case made under false facts and remedy therefore, contrary to the allegations and admissions of either party in said case, and contrary to such certain material facts supported in the record of the case, had Petitioner been deprived of one of the elements of due process of law guaranteed by the Fifth or Fourteenth Amendments to the Constitution of the United States on the grounds that

Petitioner's evidence on wrongful foreclosure where Petitioner was not in default of the mortgage terms of contract has not been heard, and not allowed to be heard, and the court's system has barred Petitioner from being heard and Petitioner has been refused a day in court and deprived of the opportunity in the Michigan State courts to dispute, with proof, the erroneous facts and notoriety of the erroneous facts judicially noticed and any inferences to be drawn therefrom?

That the doctrine of judicial notice is a well entrenched part of our judicial system and is not controverted. The doctrine of "judicial notice" is based upon obvious reasons of convenience and expediency and operates to save trouble, expense and time which would be lost in establishing, in the ordinary way, <u>facts which do not admit of contradiction</u>.

"Matters of which the court will take notice are necessarily uniform or fixed and do not depend upon uncertain testimony, for as soon as a matter becomes disputable, it ceases to fall under the head of common knowledge and so will not be judicially recognized. The test is whether sufficient notoriety attaches to the facts involved, so as to make it safe and proper to assume its existence without proof."
20 <u>Am Jur.</u>, Evidence, at 9, p. 50,
29 <u>Am Jur 2d</u>, at 23, p. 60, Evidence.

The facts which the Michigan courts, at various levels, took judicial notice of in the instant case are patently disputable. Where the Wayne County Circuit Court allowed the defendant's testimony as to an alleged "shortage" of requirements for "escrow" relating to a mort-

gage contract with no language in said contract for any provisions as to "shortage of requirements" and no proofs or exhibits are entered in the court record from which figures tossed around by the defendants and the court may have been obtainable, but which were not submitted and the court said "I don't want to hear anything more about it. The injunction may be dismissed and they can proceed to foreclose." -- and disallowing your Petitioner to testify, disallowing your Petitioner to present proofs and exhibits that she was not in default of any of the provisions or conditions of said mortgage contract, is inescapably a denial of due process of law and a denial of the equal protection of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States on the grounds that Petitioner's evidence was never heard and was never allowed to be heard by the court. - App. 18-28, infra.

Further, contrary to the Michigan Supreme Court decision of October 6, 1977, (App. 91-103, infra) the "Order Dissolving Temporary Restraining Order"as entered by the Wayne County Circuit Court is not a judgment. App.28-30, infra. Where said "Order" as entered on September 27, 1968, reads "and the Court having heard testimony and examined the Exhibits which have been filed and heard oral argument by the attorneys representing both parties, and the Court having determined that Plaintiff is in default on her mortgage * * * and the Defendants are hereby permitted to proceed with their foreclosure action * * * ", is contary to all well established rules of law and rules of evidence on the grounds that no exhibits were presented and your Petitioner's evidence was never heard and the court disallowed your Petitioner's evidence to be heard in violation of the due process clauses of both the

Michigan Constitution of 1963, Article I, Sections 2 and 17, and the Fifth and Fourteenth Amendments to the Constitution of the United States.

Moreover, the defendant's testimony on September 6, 1968, alleging a "shortage" in escrow requirements where no debt was established, and your Petitioner's testimony, proofs and evidence were disallowed, did not establish probable cause or a cause of action to permit the defendants to proceed with the foreclosure, and no default by mortgagor (Petitioner) was established where statutory provisions require that a mortgagor be in default for a mortgagee to be entitled to foreclose a mortgage.

The said "Order" dated September 27, 1968, is not a judgment; there were no findings of fact; no default and no debt was established. The Michigan Supreme Court is in error, and in fact, the proceedings held on September 6, 1968, resulting in the entry of "Order Dissolving Temporary Restraining Order" (which is not a judgment of default) constitutes the undermining of the fundamental rights of all litigants invoking the jurisdiction of the Michigan courts; and thus, is a denial of due process and a denial of the equal protection of the law.

The following pages point out other errors and omissions by the Michigan Supreme Court.

Speaking of the propriety of taking judicial notice, this Court said in Brown, et al. v Piper, 91 US 37, at pages 42, 43:

> "This power is to be exercised by the courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative."

The Court of Appeals for the Second Circuit followed, with approval, Brown v Piper, supra, in Alvery v United States, 302 Fed 2d 790, where it was stated, at page 794:

> "On fact questions the Court should not use the doctrine of judicial notice to go outside the record unless the facts are matters of common knowledge or capable of certain verification." (emphasis added)

In the instant case, the Michigan Supreme Court did not heed the caveat of this Court regarding the propriety of taking judicial notice.

Assuming, arguendo, that the facts were of the type which could be properly noticed judicially, we are then faced with the issue of the propriety in taking judicial notice where judicial notice has not been requested. The propriety of taking judicial notice under these circumstances was before this Court in Quong Wing v Kirkendall, 223 US 59. In that case Mr. Justice Holmes, speaking for the Court, said, at pages 63, 64:

> "It may or may not be that if the facts were called to our attention in a proper way the objection would prove to be real. But even when called to our attention the facts should be taken notice of judicially, whether because they are only the premise for a general proposition of law, Prentis v Atlantic Coast Line Co., 211 US 210, 227; South Ottawa v Perkins, 94 US 260; Telfair v Stead, 2 Cranch, 407, 418, or for any other reason, still there are many things that courts would notice if brought before them that beforehand they do not know. * * * Laws frequently are enforced which the court recognizes as possibly or probably invalid if attacked by a different interest or in a different way. * * * "

The general rule of law on this subject is well stated in 113 A. L. R. 258, at 260:

> "With respect to facts, as distinguished from laws, the weight of authority supports the view that judicial notice will not be taken on appeal of a fact within the judicial knowledge of the court, which was not called to the attention of the trial court and was not judicially noticed by it. See the note in Ann. Cas. 1914B, 196; 1 Jones, Ev., 2d ed., 474. And see 15 R.C.L., Judicial Notice, 6.
>
> " 'The explanation is that that facts susceptible of notice are nevertheless matters of evidence and an appellate tribunal can only review evidence considered by the court below.' 1 Jones, Ev., 2d ed., 474."

The taking of judicial notice without the request of either party has the effect of placing the Michigan Supreme Court in a position of a voluntary advocate for the party for whose benefit these judicially noticed facts inure. Advocacy by the court for any party would, of course, be highly improper and is all the more reason for exercising the utmost restraint in taking judicial notice of facts where there is any indication that they may be disputable.

In addition to the foregoing, and perhaps more important insofar as the issues here presented are concerned, is the fact that the Michigan courts, at its various levels, including the Michigan Supreme Court, took judicial notice before the case had been submitted. As pointed

out previously, judicial notice was not requested at any stage of the proceedings; nor was it even mentioned in a casual way in any of the arguments, in any court. Petitioner was first apprised of the taking of judicial notice by the Michigan Supreme Court when its opinion (Appendix "N", infra) was filed on October 6, 1977, over nine (9) years after initiating this case in her attempts to be heard on a wrongful foreclosure. It is obvious, therefore, that Petitioner never had an opportunity to contest the truth and notoriety of the facts judicially noticed, by the introduction of proofs or even in argument. Such action is contrary to the decision of this Court in Ohio Bell Telephone Company v Public Utilities Commission of Ohio, 301 US 292. In that case this Court said, at pages 301, 302:

> " * * * Moreover, notice, even when taken has no other effect than to relieve one of parties to a controversy of the burden of resorting to the usual forms of evidence. Wigmore, Evidence, 2567; 1 Greenleaf, Evidence, 16th ed., p. 18. 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.' Ibid. Cf. Shapleigh v Mier, 299 US 468. Such at least is the general rule, to be adhered to in the absence of exceptional conditions."
>
> * * * * * * *
>
> " * * * Even so, to press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial."

The above case was cited with approval and followed in a more recent decision, Garner v

Louisana, 368 US 157, where this Court said, at page 173:

> " * * * There is nothing in the records to indicate that the trial judge did in fact take judicial notice of anything. To extend the doctrine of judicial notice to the length pressed by the respondent would require us to allow the prosecution to do through argument to this Court what it is required by due process to do at the trial, and would be "to turn the doctrine into a pretext for dispensing with a trial." Ohio Bell Telephone Co. v Public Utilities Comm'n, 301 US 292,302. Furthermore, unless an accused is informed at the trial of the facts of which the court is taking judicial notice, not only does he not know upon what evidence he is being convicted, but, in addition, he is deprived of any opportunity to challenge the deductions drawn from such notice or to dispute the notoriety or truth of the facts allegedly relied upon."

This Court has specifically ruled in Ohio Bell Telephone Company v Public Utilities Commission, supra, and Garner v Louisiana, supra, that where judicial notice of facts is properly taken the opponent is not precluded from disputing the matters by evidence if he believes it disputable. Here, Petitioner claimed the judicially noticed erroneous facts were disputable at the first opportunity afforded by filing her Application for Rehearing before the Michigan Supreme Court. Petitioner makes the same assertion here and stands ready to dispute the facts by proof upon a proper trial of the case. Petitioner has not yet been given the opportunity to be heard on "wrongful foreclosure" where Respondents foreclosed precipitously because of a dispute over excessive "escrow" requirements and to conceal

their other wrongdoings in retaliation to your Petitioner's complaints. Respondents took Petitioner's money and applied it to "escrow" and then foreclosed before or prior to Petitioner's refusal to pay "escrow." The foreclosure occurred first. Subsequently, Petitioner refused to pay escrow. The difference in these elements are of great and significant importance, and the Michigan Supreme Court has turned the facts around erroneously, to Respondents advantage and which is totally unfair to Petitioner. In any event, the truth should prevail for all purposes.

It is assumed herein that Respondents will contend that no proof Petitioner could offer at a trial (a proper trial) could overcome the judicially noticed erroneous facts as appearing in the Michigan Supreme Court opinion of October 6, 1977. Such a conclusion is not valid for, as this Court observed in reversing judgment in Saunders v Shaw, 244 US 317, where the lower court assumed the facts in favor of Respondents appeared to be uncontrovertible so that the granting of a new trial would be "an empty form --a mere concession to technicality," at page 319:

> "It may turn out so, but we do not see in the record an absolute warrant for the assumption and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in."

In the instant case, therefore, regardless of how anybody may covertly value the merits of Petitioner's future contemplated proofs contesting the truth and notoriety of the facts judicially noticed, "due process" requires that Petitioner should have the opportunity to present her evidence on these points.

In Brinkerhoff-Faris Co. v Hill, 281 US 673, this Court said, at page 681:

> "We are not now concerned with the rights of the plaintiff on the merits, * * *; or with the accuracy of the state court's construction of the statute * * * . Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense--whether it has had an opportunity to present its case and be heard in its support. * * * "

That your Petitioner was deprived of due process in the primary sense in the instant case is obvious. The judicially noticed facts upon which a new theory was advanced, to wit: "Plaintiff admits in her brief that she did not maintain a current escrow account. * * * Defendants complied in all respects with the requirements of the statute. * * * Plaintiff obtained a temporary restraining order, which was subsequently dissolved after the court determined that plaintiff was in default of her mortgage. * * * (at 256, 257) Plaintiff finally stopped the escrow payments, * * * We next consider whether or not plaintiff's refusal to make timely escrow payments for taxes and insurance constituted a "default * * * in any condition of (the) mortgage", allowing foreclosure by advertisement pursuant to MCLA 600.3201; MSA 27A.3201. * * * (at 261) We are convinced that under the terms of the contract before us, plaintiff has defaulted on a condition. By refusing to pay monies into escrow, plaintiff failed to perform a covenant the performance of which was a condition of the contract. * * * (at 262) Here plaintiff refused to make the payments. * * * " THESE ARE ALL RELATIVE TO ERRONEOUS AND FALSE FACTS, and contrary to the record on appeal which shows

by date sequence that Plaintiff (Petitioner herein) never failed to pay escrow each and every month, and that the Respondents initiated the foreclosure during the period of 15 days, on May 23, 1968, where by the terms of the mortgage note no penalty or late charge would occur for payments made during said 15 days, between May 15, 1968 and May 30, 1968. During said 15-day period, and before, Petitioner was waiting to be furnished with receipts from the Respondents to substantiate their excessive requirements for the "escrow" account because Petitioner was disputing said excessive requirements. The excessive requirements can be easily proved. The record shows that your Petitioner paid "escrow" each and every month without fail, the last payment being in the amount of $82.19 in her April 26, 1968, payment totaling $196.17 for principal, interest, additional principal and escrow, as allocated by the Respondents (mortgagee). While the mortgagee commenced the foreclosure by advertisement on May 23, 1968, and Petitioner had no knowledge of it, she then made her very first payment without "escrow" moneys on May 29, 1968, and the mortgagee had already initiated said foreclosure but mortgagor did not know about the foreclosure until on June 1, 1968, by the newspaper clipping which said "Notice of Mortgage Sale" dated May 23, 1968, and which by Respondents affidavit was posted on May 31, 1968. The foreclosure was commenced before Petitioner made her May 29, 1968 payment without moneys for escrow. These matters have never been testified to by either the Petitioner or the Respondents. However, they appear in the record by various other ways and exhibits filed in the court record during the period of August 1973, five (5) years or so after the foreclosure of May 23, 1968, but the court and the Respondents would not allow any testimony as to the "foreclosure" during the hearing and trial on Count IV - Breach of

Fiduciary Duty. The other five (5) counts pertaining to "wrongful foreclosure" have never been heard, and the court would not permit them to be heard. The foreclosure was prematurely and precipitously, indeed, maliciously initiated for the reason that Petitioner disputed the excessive requirements of escrow by the mortgagee, and Petitioner complained about not being furnished with tax bills or receipts to account for any disbursements from her "escrow" account. Petitioner was waiting for some answer from the mortgagee as to her request to pay her own taxes and insurance, to assure timely payment of same, and to enable her to have receipts. Mortgagee had consistently refused to furnish receipts. Petitioner requested a release from the "escrow" clause of the mortgage covenant and agreement. Mortgagee never answered to mortgagor's request, and instead foreclosed the mortgage loan when mortgagor was not in default and there was a credit surplus balance in her "escrow" account, which the mortgagee utilized several months after the foreclosure. Petitioner was effectively barred from introducing proofs. The Michigan Supreme Court's theory first advanced in their decision of October 6, 1977, has not been priorly advanced by the Respondents in any court proceedings. While it can be assumed that Respondents will oppose Petitioner's position and assert to the contrary, it can also be assumed that there was nothing to prevent the Respondents from introducing any proofs in support of the theory first advanced in the Michigan Supreme Court decision. If Respondents had introduced any such theory, the record itself would have shown to the contrary. Therefore, there was no reason for Petitioner to introduce proofs, when the record shows that she never failed to pay escrow and did so each and every month by the Respondents exhibits filed in the case. The law does not require litigants to

introduce proof on points not in issue and to do so would not only be immaterial but would be a complete waste of the Court's time.

Contrary to the pronouncements of this Court, the Michigan Supreme Court in taking judicial notice of the facts referred to in the instant case, changed the theory of the "wrongful foreclosure" completely, with the facts reversed, erroneously.

The decision of the Michigan Supreme Court is also in conflict with the general rule as set forth in 31 CJS, Evidence, at 9, n.88 (2), where it is stated:

> "It is not within the scope of judicial notice principle to take controversial matters out of case and court will not take judicial notice of matters inferentially at variance with pleading."

and Visayan Refining Co., Inc. v Standard Transp. Co., et al, 17 Fed 2d 642, where the Court said on page 644:

> "Nor can the Court, by taking judicial notice of facts which are not alleged, change the case from that stated by plaintiff."

It is obvious that the facts thus judicially noticed, the inferences drawn therefrom, and and theory advanced by the Michigan Supreme Court were never presented to the jury for its consideration in determining the ultimate rights of the litigants.

If we assume, arguendo, that the facts judicially noticed were facts which could properly be noticed under the circumstances, the fallacy in reasoning is obvious, and at least, unforgivable.

ERRORS AND OMISSIONS BY MICHIGAN SUPREME COURT

Wrong facts result in a wrong decision. First, the facts must be correct so that justice may prevail. The Michigan Supreme Court fails to note that "no right of foreclosure exists in the absence of default" by a mortgagor.

> "A foreclosure must comply with terms of contract." Salinger et al, v Lincoln Nat. Life Ins. Co., 52 F 2d 1080 (1931)

The Michigan Supreme Court erroneously, in their decision of October 6, 1977, uses the terminology "alleged deficiency." Since, in fact, there was no deficiency, there cannot be an "alleged deficiency." The mortgagee never used the term "deficiency." The lawyers and the courts have latched onto the word "deficiency" erroneously. The Michigan Supreme Court fails to note that where there is a credit or surplus balance in escrow, there cannot be a "deficiency."

Many times, this mortgagor (Virginia Cramer) inquired of the mortgagee (Metropolitan Federal Savings and Loan) "Why don't you ask for a deficiency, if any exists"(in accordance with the terms in the contract), but the mortgagee replied that they couldn't. The mortgagee's estimate of escrow was labeled "shortage of requirements" which is what they foreclosed on, inasmuch as there was no deficiency. Mortgagee's "shortgage of requirements" was an inflated figure in an excessive amount, and mortgagor herein alleges that mortgagee estimated excessively and then made threats of foreclosure as an extortion racket to collect excessive escrow to fatten their coffers for self-dealing purposes. The facts and actual figures support this allegation.

In the instant case, the covenant and agreement, paragraph 2, required mortgagor to pay "escrow" in monthly installments, and which the record shows that mortgagor never failed to pay "escrow" in said monthly installments as estimated by the mortgagee. Mortgagor also paid additional sums into escrow in dispute of mortgagee's excessive calculations. Mortgagor never failed to perform her covenant, the condition of which was to pay "escrow" in monthly installments. In fact, the following payments into "escrow" were made and accepted by the mortgagee preceding the premature acceleration of the debt.

Mortgagor paid "escrow"	As required by Mortgagee
January 1968	$46.19
February 1968	46.19
March 1968	50.19
April 1968	82.19

Mortgagor's current April 26, 1968 payment was allocated by mortgagee as follows:

Principal and interest	$103.81
Additional principal	10.17
"Escrow" installment for April	82.19
Total current April 1968 payment	$196.17

Mortgagor made no objections to mortgagee's allocation of the said April 1968 monthly installment payment. Mortgagee's policy was to amortize "escrow" amounts into 12 monthly installments in lieu of requiring mortgagor to pay a large lump sum payment. Therefore, the $82.19 figure, as shown above, was the amount required by mortgagee for the current April 1968 monthly installment.

Also, on April 26, 1968, mortgagor requested that she be given a "release" as to paying escrow in view of the mortgagee's flagrant violations of the mortgage terms and conditions. Mortgagee never responded to mortgagor's request for a "release." Instead, mortgagee foreclosed by advertisement on May 23, 1968.

Mortgagee's policy was also to estimate excessive escrow amounts by cushioning the calculations and thereby violating the terms of the escrow clause, paragraph 2, by purposely not taking into account "less the sums already paid therefor" which mortgagor disputed. Mortgagee never required a "deficiency" as worded in the mortgage contract. Mortgagor objected, among other things, to paying excessive escrow labeled as "shortage of requirements" under threats of foreclosure, and especially where mortgagee refused to furnish mortgagor with any paid receipts to account for said "escrow" funds.

Mortgagee labeled their excessive escrow estimates as "shortage of requirements" where such words do not appear in the entire covenant and agreement. Mortgagee's testimony (by Mr. Denyer) on September 6, 1968, (App. 22-28, infra) does not mention the word "deficiency", and instead Mr. Denyer refers to "shortage" or "requirements." Only the lawyers for the mortgagee use the word "deficiency" which is misleading and dishonest, and which the Michigan Supreme Court has reiterated dishonestly.

An estimate for future taxes and insurance cannot be termed a "deficiency" where the amount is unknown, not due, not assessed, and not billed. The mortgagee foreclosed on their estimate labeled as "shortage of requirements" which was not a deficiency and not expended by the mortgagee.

The mortgagee's terminology of "shortage of requirements" have reference to "escrow" moneys over and above any debit or credit balance in the escrow account of each mortgagor. (See mortgagee's letter of September 27, 1968, with reference to amortizing a "shortage" over a 12-month period; Page 35 , infra, and also Exhibit 34 of 8-21-73, where mortgagee refers to "shortage of requirements" when mortgagee also shows a credit surplus balance in escrow, page 26a, Volume I , Appendix on Appeal.)

Therefore, the Michigan Supreme Court is in error by referring to an "alleged deficiency" where there was no such deficiency. The mortgage contract allows for the mortgagee to request forthwith payment of a "deficiency;" the mortgage contract does not mention any such words as "shortage of requirements" and where there was no deficiency, there was no default and the foreclosure was illegal.

Further, there is no way the courts and the Respondents can justify the mortgagee's foreclosure on a "shortage of requirements" as moneys in the amount of $401.03 on May 23, 1968, where the only next liability not yet assessed and not billed was to be paid two months later, in July 1968, in the amount of $101.33 for city taxes. Mortgagor paid this city tax of $101.33 herself, directly, in July 1968, after the foreclosure of May 23, 1968 where the mortgagee foreclosed on "escrow" (not a deficiency) in the amount of $401.03, which was an inflated figure consistent with their extortion racket of collecting "escrow" moneys for self-dealing purposes.

For example, to show that mortgagee's racket is a repeated process (and not a mistake), by mortgagee's letter dated February 26, 1965,

(Plaintiff's exhibit 4, at 21a, Volume I on appeal) mortgagee had attempted to extort $464.03 from this mortgagor, under threats of foreclosure, where, by mortgagee's own estimates they claimed that mortgagor had been underpaying by approximately $13.00 a month, for 18 months. Mortgagor never saw any tax bills in her name. Mortgagee refused to furnish any receipts, and refused to furnish any copies of any tax bills.

Mortgagor disputed and recalculated, in March of 1965, and sent mortgagee $243.00 (instead of $464.03) together with her monthly installment of $147.00, principal, interest and escrow, as follows:

$13.50 X 18 months, equals $243.00 escrow.

Mortgagee was furious and went into a "fit" and then in March 1965 maliciously sent mortgagor five (5) sets of computer payment cards which mortgagor replied to as follows:

(Plaintiff's exhibit 32 of 8-21-73)
"Mr. Lonnerstater -- I sent $147.00 in because that is what this sheet you made up indicates (I have the original). I do not think you should ask me to pay any late charges because I think the acct. is all messed up. I received 5 different sets of new cards, amounts showing $185.50, $152.50, $182.00, $147.00, $133.50. If we were both confused, and I needed time to straighten it out, I do not think I should be penalized. I am also under the impression that perhaps you are expecting too much to be put in escrow and I can't say that I blame you, but remember it is my money and I should know what is being done with it--True? Thank you and regards. I tore up all the cards so send me new ones. (Signed) Virginia Cramer"

Thus, mortgagee was "requiring" $464.03, under threats of foreclosure, and mortgagor recomputed the escrow in the amount of $243.00, as follows:

PAID INTO ESCROW		
3 yrs prepaid insurance	$ 144.00	
At closing, unverified	136.50	
18 months @ $29.69	534.42	
18 months @ $13.50	243.00	
3-15-65 installment	43.19	$1,101.11
PAID OUT FROM ESCROW		
3 yrs prepaid insurance	$ 144.00	
1963 city taxes	57.00	
1964 city taxes	57.00	
1963 county taxes	355.79	
1964 county taxes	371.43	
MGIC premium (1964)	40.62	$1,025.84
Escrow surplus		$ 75.27

Respondents (Metropolitan) admit that insurance due in August 1963 (after execution of the mortgage contract) was not paid until November 4, 1963; that County taxes due in December 1963 were not paid until January 1965; that City taxes due in July 1964 were not paid until sometime in 1965; that they paid no taxes in 1964; that the 1965 city taxes were paid when delinquent, with penalty; that the 1967 City taxes were paid when delinquent, with penalty.

Respondents paid penalties or interest or late charges on all of the said delinquent taxes.

The Michigan Supreme Court errs in saying "Plaintiff admits in her brief that she did not maintain a current escrow account." Plaintiff did maintain an escrow account currently according to the monthly installment requirements of the mortgagee.

Plaintiff disputed the mortgagee's excessive escrow requirements and mortgagor's reference in her brief pertains to said excessive escrow which mortgagee said they "needed" in May 1968, in the amount of $401.03, in addition to regular monthly installments of escrow, estimated by mortgagee at $51.80 each month. Mortgagee "required said amount of $401.03 in May 1968, together with monthly installment payments, for future disbursements of:

July 1968, City taxes	$101.33
July 1968, MGIC premium	30.10
December 1968, County tax	491.09
	$622.52

Therefore, mortgagee required $848.35 for ultimate disbursements of $622.52 during the year 1968, and which said $622.52 reflects increases in taxes from the previous year. Mortgagee was requiring an excessive amount of $225.83 to self-deal and to fatten their coffers, and which mortgagee foreclosed upon on May 23, 1968.

The Michigan Supreme Court further errs in saying "Defendants complied in all respects with the requirements of the statute." The statute provides:

> MCLA 600.3204; MSA 27A.3204; "To entitle any party to give a notice as hereinafter prescribed, and to make such foreclosure, it shall be requisite: (1) That some default in a condition of such mortgage shall have occurred, by which the power to sell became operative; * * * "

The statute does not intend that a mortgagee may foreclose where only the mortgagee has violated conditions of the mortgage and only the mortgagee is in default in conditions of such mortgage. There was no default in any conditions of such mortgage by the mortgagor who also never failed

to pay the escrow moneys each and every month, and mortgagor also paid escrow moneys over and above the regular monthly installments of escrow as estimated by the mortgagee. No right of foreclosure exists where mortgagor was not in default.

The statute does not provide that a mortgagee may foreclose on their excessive estimates for escrow to operate their extortion racket for self-dealing purposes. Ultimately, the figures submitted by the mortgagee in the amount of $12,611.46 for the Sheriff's sale of October 1, 1968, show that no moneys were advanced by the mortgagee for taxes and insurance, and that the mortgage balance for principal was $12,039.09. Mortgagor was required to redeem in the amount of $13,719.83 which included excessive attorney fees in violation of statute as follows:

MCLA 600.2431; MSA 27A.2431

"(1) The expenses of foreclosing any mortgage by advertisement shall be taxed in the circuit court as in civil actions * * *

(2) Where an attorney is employed to foreclose a mortgage by advertisement, an attorney's fee, not to exceed any amount which may be provided for in the mortgage, may be included as part of the expenses in the amount bid upon such sale for principal and interest due thereon in the following amounts: * * * (c) for all sums of $5,000.00 or more, $75.00 * * * "

Respondents violated said statute; no expenses were taxed in the circuit court which totaled $296.30, and of which $175.00 was charged for attorney fees in violation of said statute. Respondents (Defendants) failed to comply in all respects with requirements of statute, contrary to the Michigan Supreme Court decision.

Further, Respondents (Defendants) never notified plaintiff-mortgagor of the Sheriff's sale date of October 1, 1968, which excluded any and all competition bidding at said sale, and which was in violation of:

MCLA 600.3216; MSA 27A.3216 Sale,time,place.

"Sec. 3216. The sale shall be at public sale, between the hour of 9 o'clock in the forenoon and 4 o'clock in the afternoon, at the place of holding the circuit court within the county in which the premises to be sold, or some part of them, are situated, and shall be made by the person appointed for that purpose in the mortgage, or by the sheriff, under-sheriff, or a deputy sheriff of the county, to the highest bidder.

For the reasons that the mortgage contract does not appoint any person to conduct a mortgage sale, the Wayne County Sheriff's department conducted said fraudulent sale by rubber-stamping the mortgagee's fraudulent foreclosure, on October 1, 1968, where mortgagor was not in default of said mortgage as published on May 23, 1968, but the mortgagee was in default by violating conditions in the mortgage agreement, with sale date set for August 20, 1968, which did not occur August 20, 1968, and instead occurred on October 1, 1968, without notice to mortgagor and no hearing thereon and no debt established, constituting State action involved and in violation of the due process clauses of the Michigan and United States constitutions, and denial of equal protection of the law.

(The Michigan Supreme Court errs in perspective as well as erring in the law. Consider this:
74% of the earth we live on is covered with water, the other 26% is covered with mortgages!!!) (or almost!)

Further, the mortgage contract provides for a foreclosure on the "indebtedness" only. The published foreclosure amount of $12,519.37 included excessive escrow of $401.03 for future taxes and insurance which were not yet assessed, not yet billed, and not yet due. Mortgagee had not expended any of their funds for payment of mortgagor's liabilities, where mortgagee foreclosed on May 23, 1968, for said "escrow" funds to be used for future payments of taxes, insurance and assessments.

Thus, there was no "deficiency" when mortgagee foreclosed; there was, in fact, a credit surplus balance in mortgagor's escrow account on said date of May 23, 1968. Part of said surplus escrow which belonged to mortgagor was used subsequently by the mortgagee to pay Mortgage Guaranty Insurance Company (MGIC) premium in the amount of $30.10 which MGIC received in December 1968, about seven months after the foreclosure.

The mortgage contract (paragraph 8) provides: "In the event of default * * * mortgagee may * * * declare the entire indebtedness secured hereby due * * * ." Mortgagee foreclosed on "moneys" for "escrow," but not on the debt or indebtedness. The published foreclosure notice does not mention "debt" or "indebtedness." It reads as follows, in part:

> " * * * and no suit or proceedings at law having been instituted to recover the moneys secured by said mortgage * * * " (emphasis added)

The mortgage contract does not provide for a foreclosure on "moneys" and the debt or indebtedness had not matured.

Black's L D Rev 4th ed., defines "indebtedness" as not a contingent liability.

> "A contingent liability * * * does not constitute indebtedness." St. Louis Perpetual Ins. Co. v Goodfellow, 9 MO 149

Black's L D 4th ed, defines "debt" as "A sum of money due by certain and express agreement; as by * * * a bill or note * * * where the amount is fixed and specific, and does not depend upon any subsequent valuation to settle it." Hagar v Reclamation Dist., 111 US 701, 4 S Ct 663, 28 L Ed 569. "A sum payable upon a contingency, however, is not a debt, or does not become a debt until the contingency has happened." People v Arguellio, 37 Cal 524.

Thus, where the amount is unknown, or not specific, and the contingency had not occurred such as a billing or assessment of a sum of "moneys" certain or fixed, there were no such "moneys" due or payable, in the amount of $401.03, which the said defendants (Respondents herein) foreclosed upon for "moneys" for future taxes and insurance, not yet assessed, not yet billed, and not due. Therefore, no contingency had occurred and the Respondents had not advanced any sums so as to become a "debt" or "indebtedness" of amounts fixed and specific. Therefore, Respondents were not entitled to give notice of mortgage sale, for "escrow" moneys and Respondents were not entitled to accelerate the principal balance of the debt or indebtedness which had not matured.

There is no law authorizing the mortgagee to foreclose on "moneys." The statute provides:

> MCLA 600.3204 (2); MSA 27A.3204 (2)
> That no suit or proceeding shall have been instituted, at law, to recover the debt then remaining secured by such mortgage. * * * (emphasis added)

Neither the mortgage contract nor the foreclosure by advertisement statute authorizes foreclosure on "moneys." The foreclosure was illegal and contrary to statute. Respondents failed to comply with the requirements of the statute and there was no default by mortgagor in the terms of the mortgage contract or note. Mortgagee's published foreclosure was dated May 23, 1968. The terms of the mortgage note allowed mortgagor to make her current May 1968 payment during the period of 15 days between May 15th and May 30th, 1968, without penalty or late charge. There was no default on May 23, 1968. Mortgagee refused mortgagor's payment made on May 29, 1968, because of the foreclosure instituted on May 23, 1968, implemented maliciously to extort excessive escrow moneys otherwise mortgagor would lose her home, and lose all the equity in it.

Plaintiff-mortgagor instituted this suit as an attempt to prevent the wrongful foreclosure and obtained a temporary restraining order which was subsequently dissolved by the court where the court refused to hear plaintiff and refused to allow plaintiff to testify in dispute of the defendant's testimony; and then the court allowed the defendant to proceed with the foreclosure. The "Order Dissolving Temporary Restraining Order" was drafted by the attorney for the defendants. There was no proper hearing on the matter of "default." No debt was established. The said "Order" entered on September 27, 1968, was not a judgment and not an adjudication on the merits; there were no findings of fact. The said "Order" of September 27, 1968, was not in conformance with Michigan General Court Rule 522, and no hearing was had on said entry of said "Order." It was noticed for entry in less than four (4) days, in violation of Michigan General Court Rule 108, and with no allowance of time for objections in violation of MGCR 522. Plaintiff was not furnished with a copy of said "Order" entered on September 27, 1968, and no proof of service was filed in violation of MGCR 107. Plaintiff was not notified of the Sheriff's sale of October 1, 1968, and therefore, there was no competition in the bidding of said sale of property whereby mortgagee-defendants sold the property to themselves.

Plaintiff redeemed the property on June 5, 1969, at a higher rate of interest, after experiencing much difficulty in obtaining another first mortgage by another lending institution because, generally, in Michigan, one lending institution will not "pick-up" on another's foreclosure. It is a "policy" that all of the lending institutions have to work together, and against the mortgagor, as a means of entrapping the mortgagor.

The Michigan Court of Appeals (34 Mich App 638, 192 NW2d 50 (1971)) reversed a later summary judgment entered in the circuit court, saying "Mrs. Cramer's evidence was not heard" and allowed the filing of an amended complaint which alleged breach of contract, abuse of process, libel and slander, breach of fiduciary duty, invasion of privacy, and intentional infliction of emotional distress. Summary judgment, again, was granted for defendant-mortgagee on March 27, 1972, where defendant did not even motion the court for said summary judgment.

In an unpublished per curiam opinion (Docket No. 14149, released May 29, 1973, App. 74, infra) the Michigan Court of Appeals affirmed Summary Judgment for Defendants on all counts except that charging breach of fiduciary duty, and in effect, the Court of Appeals has said that the defendant-mortgagee (lending institutions) may breach the conditions in the mortgage contract and thus, the mortgagee may foreclose and accelerate the debt where mortgagor was not in default and no debt was established.

The subsequent jury trial on the issue of "breach of fiduciary duty" resulted in a verdict of "We find the defendant not guilty," where the jury failed to follow the court's instructions and failed to determine if a fiduciary relationship existed. Judgment was entered September 21, 1973, stating "no cause of action."

The Michigan Court of Appeals affirmed on June 2, 1975. The defendant (Metropolitan) testified that they invest the "escrow" funds at a gross profit to themselves where the contract reads "such sums to be held by the mortgagee without interest thereon" and that defendant-mortgagee failed to pay taxes when due on numerous occasions but absorbed the penalties and interest for delinquent payment of taxes; that no taxes were paid in 1964 for more than a 12-month period, where the contract reads "to pay said taxes, assessments and premiums when due."

See Appendix on Appeal, Volume II, at 562a, (T-195 and 196) where Defendant (Metropolitan) further testified, as follows:

"Q. So you consider you have some flexibility as to paying those taxes?

"A. Yes. We have a great deal of flexibility.
"Q. A great deal?
"A. Forty-five, sixty days.
"Q. But you don't have two years, do you?
"A. We have two years, yes.
"Q. You think you have two years. Do you think you can hold somebody else's money for two years when the contract says that these amounts are to be paid when due and you think you can hold them for two years?
"A. The language in the mortgage speaks for itself. If it says "when due" we are supposed to pay them when due but nobody is going to turn us away from the (State or County or City) treasurer's office if we go in a year and a half later."

* * *

In Michigan, real property taxes are assessed, billed and payable in advance. Michigan statutes providing for the subjection of sale and redemption for the enforcement and collection of tax liens for taxes delinquent and unpaid for more than one year after such assessments of taxes are returned to the State treasurer as delinquent, are set forth in MSA 7.104 and MSA 7.105, et seq. A quick clarification of said provisions of said statutes with the County tax collector's office, reveals that property taxes may remain unpaid for a period of somewhere between 26 and 33 months before a tax sale of land would occur for the collection of such tax liens of the State, and such assessed taxes remain the liability of the title-holder of real property. Thus, the "security of the mortgage" is not jeopardized until taxes are unpaid for 26 to 33 months. Thus, accordingly, by the mortgagee's intent and purpose of collecting "escrow" funds from the mortgagor in advance before taxes are assessed and not even billed, and the mortgagee

invests said escrow funds for profit and gain to the mortgagee only, and then estimates excessive amounts of escrow under threats of foreclosure, and the mortgagee forecloses when mortgagor refuses to pay excessive escrow where it is obvious that the mortgagee has computed the escrow excessively, and the mortgagor had an excellent payment record, the implication is clear that the mortgagee optionally self-deals with said escrow funds belonging to the mortgagor. Mortgagee's paramount intent is to collect "escrow" funds, as a regularly planned program (analagous to the techniques of ordinary bill-collectors for past due creditor's bills from debtors who have failed to meet their obligations on debts). The environment is frightening! Then, after mortgagor pays the escrow funds, in advance, and the mortgagee fails to pay taxes and insurance with said escrow funds, upon mortgagor's complaint the mortgagee replies "What the hell do you care when we pay the taxes!" That is "loan-sharking," exemplified!

The Michigan Supreme Court decision of October 6, 1977, where the ruling was "the foreclosure was licit" is but one exemplification that, in Michigan, we do not have a system of law; we have a system of corruption.

Further, for the Michigan Supreme Court to write their decision as "She refused to pay escrow * * * the foreclosure was licit" is, at the very least, backwards. The correct facts are: while mortgagor was waiting for the mortgagee to either recompute the escrow or give her an answer as to a "release" from paying escrow, the mortgagee foreclosed prematurely and precipitously when mortgagor was not in default, and subsequently, the mortgagor refused to pay escrow after the mortgagee commenced the foreclosure.

If the Michigan Supreme Court members had paid attention to the sequence of dates of occurrences, an important element in procedural factors, they would not have so grossly erred in their decision of October 6, 1977.

The mortgagee published the foreclosure on May 23, 1968, during the period of "15 days from the due date thereof" where the mortgage note provides that no penalty or no late charge will be collected by the mortgagee during the said period of 15 days (from the 15th through the 30th) which constitutes a waiver as to payments due on the 15th.

The published foreclosure figures of $12,519.37 may be broken down as follows:

Debt remaining secured ----------		$12,041.91
Escrow surplus ----------	$ 32.92	
Escrow for future taxes & insurance ----------	433.95	
Difference for escrow ----------		401.03
Interest at 7% ----------		76.43
Published foreclosure amount --------		$12,519.37

Respondents had advanced no moneys for taxes and insurance. No taxes were due and none were unpaid at the time of said foreclosure on May 23, 1968.

The foreclosure, in the instant case, constitutes fraud and unfair dealing. Further, there is no similarity of figures for the Sheriff's sale of October 1, 1968, and to those figures which the Defendant (Metropolitan) testified to on September 6, 1968. Further, the defendant did not testify as to any "debt."

In Drannek Realty Co. v Nathan Frank, Inc., (1940) 139 SW 2d 926, the Supreme Court of Missouri held:

"Where there is fraud or unfair dealing surrounding a sale under a deed of trust, sale must be set aside altogether."

See 59 CJS, Mortgages, at 601, page 1051 --

" * * * The mere fact that a mortgagor takes no legal steps to stop a foreclosure which is wholly unauthorized and void because no default in the conditions of the mortgage has occurred does not necessarily bar him on ground of ratification or estoppel from questioning it afterward * * *. Material defects or errors connected with the exercise of a power of sale may justify the setting aside of the sale. A court of equity may set aside a foreclosure sale under a power in a mortgage or deed of trust, on proof of any fraud, concealment, or deceit in the sale, or misconduct or partiality of the mortgagee or trustee, or unfair and oppressive conduct in forcing the sale, where there appears to have been a scheme * * * to obtain possession of the land, or on proof of any unfairness, trickery, or lack of integrity in the conduct of the sale or any attempt to stifle competition. The sale may also be set aside if it was made when nothing was due, as for example, if it was made before the secured debt was due, or after it was paid or sufficiently tendered, because of a failure to give the proper notice or a misleading error in the published notice * * * or a failure to pursue the power strictly * * *."

In a case where foreclosure was effected in the absence of a provision in the mortgage authorizing mortgagee to withhold part of the loan until

mortgagors repaired and painted the building, the court held that such provision could not be incorporated therein by bringing foreclosure suit and that a foreclosure must comply with the terms of the contract. In that case mortgagee possessed moneys belonging to mortgagors and was obligated to apply such moneys in payment of interest when interest became due. The court held:

"Mortgagee could not properly apply moneys involved in reduction of principal amount of loan, which had not matured, and then invoke acceleration clause of mortgage by asserting that interest due was unpaid, and therefore that entire loan was due, and foreclosure of mortgage timely. * * * No right of foreclo- exists, in absence of default under either mortgage or some separate agreement." Salinger et al v Lincoln Nat. Life Ins. Co., 52 F 2d 1080 (1931) (emphasis added)

In the instant case, mortgagor had considerably prepaid on the principal; indeed, mortgagor had made 130 amortized principal payments when only 56 months had elapsed during the time of the mortgage, thus, mortgagor had more than doubled the principal payments. Further, in the current April 26, 1968, installment payment, mortgagee had credited mortgagor with additional principal of $10.17, escrow amount of $82.19, and regular principal and interest amount of $103.81, totaling $196.17. Mortgagee could not properly apply moneys involved in reduction of principal, over and above regular principal in the amount of $10.17, and the required amount of $82.19 for escrow, where the principal had not matured and the $82.19 was all that mortgagee required as an installment payment for the escrow account, and then invoke the acceleration clause of mortgage by asserting that "escrow" allegedly due was unpaid, and therefore entire loan was due on

May 23, 1968, the published foreclosure date, where by the terms of the mortgage note mortgagor could make the current May 1968 payment during the period between the 15th and 30th without penalty or late charge, constituting a waiver for a payment due on May 15, 1968.

Where the mortgagee "required" only $82.19 in escrow, which resulted in a credit surplus for the escrow account, there could not have been a "deficiency;" indeed, not even an "alleged deficiency." If there had been any valid deficiency in the escrow account for moneys which may have been expended by the mortgagee, belonging to the mortgagee, then the mortgagee could properly have applied the additional principal of $10.17 and other amounts from the principal to the escrow "deficiency" if any such "deficiency" existed. Here, there was no deficiency in the escrow account; there was a surplus credit balance in escrow which belonged to the mortgagor. Further, the mortgagee did not utilize the said escrow surplus until about seven (7) months after the published foreclosure date of May 23, 1968, for MGIC premium which was received by Mortgage Guaranty Insurance Co. sometime in December, 1968. The remaining escrow surplus credit balance which were mortgagor's funds, mortgagee applied as a further reduction of the principal amount of loan.

Here, there is more. Mortgagee said $401.03 was needed for the escrow account in addition to the escrow surplus credit already on deposit, and where the next liability to be paid was only $101.33, for city taxes to be due two months after the foreclosure of May 23, 1968. Since the payment of escrow is allegedly for payment of taxes and insurance in abstention of waste, the mortgagee could not properly allege "waste".

No taxes were due, none were assessed, none were billed and none were unpaid, at the time of the foreclosure. Mortgagor paid the city tax of $101.33 directly, herself, when due in July 1968, after the foreclosure date of May 23, 1968.

Subsequently, mortgagor tendered the timely payment for May 1968, which mortgagee refused "on account of the foreclosure." Mortgagee also refused the current June and July 1968 payments tendered by mortgagor, presumably because said payments did not include "escrow" --- for the mortgagee to mishandle and self-deal with. In December 1968, mortgagor left her check in the local tax collector's office, in the amount of $491.09 for payment of 1969 taxes. Mortgagee had obtained the bill from the tax collector's office, and thus, mortgagee prevented mortgagor from paying her own taxes directly, when due, because the tax collector could not accept mortgagor's payment for taxes when she could not present the bill for advance payment, when due.

The United States Supreme Court in Longyear v Toolan, 209 US 414, 28 S Ct 506, (1908) held that it was unquestioned that the owner of real property is entitled to claim the protection of the Due Process Clause in respect to the assessment and collection of taxes. In the instant case, Respondents collected "escrow" from your Petitioner, but Respondents refused to furnish even copies of receipted tax bills to the mortgagor (Virginia Cramer). Mortgagor never saw a tax bill in her name during the entire 56 months of the mortgage period, until after the foreclosure date of May 23, 1968. The mortgagor-titleholder of the real property is entitled to see the tax bill. More, she is entitled to pay the tax bill. Due Process under the Fourteenth Amendment of the United States Constitution

requires it as a procedural protection that the mortgagor-title-holder of real property see her tax bills, at least. Mortgagee had consistently claimed that receipted tax bills were not available to mortgagor, and that even if mortgagee were to furnish such receipts, mortgagor would not understand them; a denial of due process under the provisions of the Fourteenth Amendment to the U. S. Constitution.

In McKenzie v Evans (1934) 96 Mont 1, 29 P2d 657, that court declared:

> "It is said that public policy requires that taxes be paid promptly when due or delinquent. Payment thereof by one whose property may be ultimately liable therefor should be encouraged rather than the contrary, and the requirement as to the necessity of payment should not be strictly but liberally construed in order to entitle a lien holder who paid such taxes to the benefits of subrogation. * * * (emphasis added)

In the instant case, funds were available for the prompt payment of taxes and the failure of the mortgagee to pay taxes when due by the terms of the mortgage was not for lack of funds. In Gully v First National Bank, (1936) 299 US 109, the court said,

> " The obligation of the contract being a creation of the state, the question remains whether the plaintiff counts upon a federal right in support of his claim that the contract has been broken. The performance owing by the defendant was payment of the valid debts, and taxes are not valid debts unless lawfully imposed. * * * True, the tax, though assessed through the action of the state, must be consistent with the

> federal statute consenting, subject to restrictions, that such assessments may be made. (12 U. S. C. 548) It must also be consistent with the Constitution of the United States. (citations omitted) (emphasis added)

In the instant case, Respondents rely upon federal regulations promulgated by the Federal Home Loan Bank Board, 12 USCA 1421, et seq., 47 Stat. 725; Home Owners Loan Act of 1933, 12 USCA 1461 et seq., 48 Stat. 127; as their basis for foreclosure by a federally chartered savings and loan association, as mortgagee who foreclosed on "escrow" moneys for the future payment of taxes and insurance not yet assessed and not yet due; indeed, not even billed. There is no way a mortgagee or a mortgagor can determine what the amount of taxes will be prior to assessment and billing.

Therefore, this case has its origin in the laws of the United States as one arising under those laws and "substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." Shulthis v McDougal, 225 US 561, 569; Hopkins v Walker, 244 US 486, 489.

The instant matter has never before been presented in the United States Supreme Court. It should have been, many years ago, but was not. The several States, as involving taxes collected in the form of "escrow" moneys by lending institutions on mortgage loans, apparently have no standing as suitors or other objections non-federal in their nature. The State is not a party to the contract between a mortgagor and mortgagee. However, the existence of said

controversy arising under federal law has denied your Petitioner the right to be heard in the State courts; a denial of due process under the Fifth and Fourteenth Amendments to the United States Constitution.

The Respondents (mortgagee) foreclosed the mortgage loan asserting that their basis for the foreclosure is under federal regulations, and the controversy arises whereby your Petitioner asserts that Respondents are incorrect in their interpretations of said federal regulations.

> "What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end." Bird v St. Paul F & M. Insurance Co., 224 NY 47, 51; 120 NE 86; Leyland Shipping Co. v Norwich Fire Insurance Society, (1918) A.C. 350, 369; Insurance Co. v Boon, 95 US 117, 130; Milwaukee & St. Paul Ry. Co. v Kellogg, 94 US 469, 474.

In Michigan, we have a statute requiring a property owner to pay taxes, stating as follows:

> Act 206 P. A. 1893, as amended CL 48 211.44; MSA 7.87
> Sec. 44. Each property owner assumes the responsibility of administering his property. This includes payment of any taxes assessed as they become due.

Also, see Contracts, CJS 201 -- "A contract made in violation of a statute is illegal and unenforceable, and it is usually immaterial

whether the thing forbidden by statute is malum in se or merely malum prohibititum, see CJS 191, Contracts. An agreement which violates a provision of a statute or which cannot be performed without a violation of such provision ordinarily is illegal and void. It is immaterial whether the contract is directly prohibited or arises collaterally out of transactions prohibited by statute."

Words and Phrases - "Malum in se" - "The phrase "malum in se" means literally a wrong in itself and is an act involving illegality from the very nature of the transaction upon principles of natural, moral and public law." State v. Shedoudy, 118 P2d 280, 287 ; 45 NM 516.

Words and Phrases - "Malum Prohibitum" - "An act "malum prohibitum" is an act made wrong by legislation, a forbidden evil." Whitlock v State, 216 SW 2d 22, 24; 187 Tenn 522.

In the instant case, mortgagor (Petitioner) wanted to pay her own taxes and sought a "release" from the "escrow" clause, and so as to prevent mortgagee (Respondent) from mishandling "escrow" by self-dealing and failing to pay taxes when due. When the mortgagee foreclosed on "escrow" moneys, there were no taxes or insurance due and none were unpaid. The "escrow" moneys required by the mortgagee are not a debt.

> "To enforce a mortgage, the mortgagee must prove his debt, and can recover only to the extent of what he proves." Wood v Weimar, 104 US 786, 26 L Ed 779.

The foreclosure was illegal for the reason that "escrow" money is not a debt. The mortgage

contract is illegal for the reason that it is a contract against the Michigan statute CL 48 211.44; MSA 7.87, above cited.

Parties to a contract do not have a private right to contract where the terms and conditions are illegal and against a statute.

Also, in the instant case, the Sheriff's office was utilized to enforce said illegal contract; thus, State action is involved and said enforcement of said illegal contract constitutes a denial of and a violation of the Due Process clauses under the Michigan and United States Constitutions, and denial of equal protection of the law.

Mortgagor herein (Petitioner) performed her covenant, the performance of which was a condition to pay "escrow", and which she did each and every month without fail. The mortgagee (Respondents) failed to perform by failing to pay taxes and insurance when due, among other failures and violations of said contract; thus the mortgagee had no right to terminate the contract and had no right to foreclose the mortgage loan by instituting foreclosure by advertisement where there was no default by the mortgagor. 17A CJS 397, Contracts, " * * * and where a contract has been fully performed by one party it cannot be terminated by the other." Union Pacific Railroad Company v Kansas City Transit Company, Inc., 401 SW 2d 528, 534; Business Men's Assur. Co. of America v. Eades, 161 SW 2d 920, 290 Ky 553, wherein CJS is quoted in both cases,

> "Where a contract has been fully performed by one party, it cannot be terminated by the other."

Therefore, even if the parties do have a right to private contract, under State law, if the contract is not illegal, the mortgagee had no right to terminate said contract by foreclosure, for the reasons that mortgagor fully performed by paying "escrow" moneys each and every month without fail while the mortgagee failed to perform and violated terms and conditions of said contract by failing to pay taxes and insurance when due according to the terms of said contract, among other violations by the mortgagee, and said foreclosure was illegal.

Another Michigan statute precludes a mortgagee from foreclosing a mortgage loan unless the payment of principal or interest is two (2) months in arrears, as follows:

MCLA 489.778; MSA 23.540 (378)

> "Sec. 378. Whenever a borrowing member is in arrears in the payment of principal or interest for 2 months or more, the board of directors may declare the loan in default and the whole amount of the loan due and payable * * * ."

meaning, of course, that the board of directors may not declare the loan in default and the whole amount of the loan due and payable seven (7) days after the due date of May 15, 1968, which said publication for foreclosure in the instant case occurred on May 23, 1968.

The Respondents herein have failed to show any probable cause for foreclosing the mortgage. Foreclosure by advertisement was an act in the use of the process not proper and illegal, and not within the scope of authority. The foreclosure was wholly unauthorized, an abuse of process, illegal and a crucial element of malice, and evidence of express malice, particularly

because Petitioner (mortgagor) had, on April 26, 1968, confronted the Respondents (mortgagee) on issues of mishandling the escrow funds by failing to pay the taxes when due and requiring excessive escrow from time to time as "shortage of requirements," contrary to the terms of the mortgage covenant and agreement. Respondents (mortgagee) had no grounds of action to foreclose, and in fact, was a distinct legal wrong which constitutes an invasion of the right of the mortgagor (Petitioner) to terminate the contract and to refuse to pay "escrow." The wrongful foreclosure by advertisement was a perversion of a "regularly" issued process, and the court's failure to issue an injunction to prevent the wrongful foreclosure was unjustifiable, and repugnant to the meaning of law.

> "The obvious advantage of the waiver provisions to the creditor is to free him from cumbersome and time-consuming foreclosure procedures. Undeniably, there is a potential for abuse attendant to any such grant of authority, but, by the terms of the agreement it is incumbent upon the debtor to initiate injunctive proceedings should he feel that foreclosure has been undertaken erroneously or in bad faith." (emphasis added) Global Industries, Inc. v Harris, et al (1974) 376 F Supp 1379.

Respondents admitted investing the escrow funds for profit, while the contract provides that "such sums (are) to be held by mortgagee, without interest thereon, to pay said taxes, assessments and premiums when due." Thus, the contract does not authorize the mortgagee to invest and profit from mortgagor's deposit of "escrow" funds. It is a violation of the contract terms and conditions.

Petitioner's initial complaint alleged "Conversion of Taxes in Escrow" and she sought an injunction to prevent the wrongful foreclosure. The failure or refusal of the court to grant an injunction, and by denying Petitioner the right to be heard, forced your Petitioner to redeem by obtaining another first mortgage from another lending institution to save her property from being stolen by the mortgagee, and thereby Respondents herein caused damages in the higher rate of interest Petitioner must pay by the forced redemption on the mortgage loan where Petitioner (mortgagor) was not in default, together with additional damages of attorney fees and other litigation costs and expenses. The foreclosure was an abuse of process initiated by the Respondents (mortgagee) to attempt to conceal their own misconduct in mishandling the "escrow" funds.

> "The gravamen for which liability is imposed in an action for abuse of process is not the wrongful procurement of legal process or the wrongful initiation of * * * proceedings, but a misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish." (emphasis added) Moore v Michigan Nat. Bank, 368 Mich 71, 117 NW2d 105, 1 ALR 3d 948.

This case involves State assessment of taxes as an ultimate fact, and is a significantly close nexus between the challenged conduct of Respondents-mortgagee who have possession of the escrow funds allocated and to be paid over as County and school taxes, and which said school taxes are appropriated by the State Legislature. The holding of the reversal of setting aside a foreclosure in Northrip v

Federal National Mortgage Assoc., 527 F 2d 23 (1975) is not applicable herein inasmuch as Northrip involved house repairs only, as distinguished from escrow funds for future tax assessments allocable to the State, in the instant case, whereby the mortgagee believes himself to have great flexibility in paying taxes with mortgagor's escrow funds to the extent of delaying payment of taxes for 2 years after taxes are due; and yet the mortgagee (Respondents herein) foreclosed on "escrow" moneys only, for future taxes before they are assessed and not even billed, and in an excessive amount, which is to fatten the coffers of the mortgagee for self-dealing purposes, for a period of time prior to paying the taxes and prior to the State's placing a lien on said property for delinquent and unpaid taxes. Thus, in the instant case, State action is involved and presents a Due Process question and issues under the Michigan and United States Constitutions.

Heretofore, Petitioner's posture in this case has not touched on such issue as "If the mortgagee-escrow-holder may pay the taxes delinquent with mortgagor's escrow funds, why can't the mortgagor pay escrow delinquently to the mortgagee?" Of course, that would be a constitutional question arising under the Due Process clause; but, in effect, it would be ridiculous to allow the lending institutions, collectively, to pay taxes delinquent with mortgagor's escrow funds. Chaos would prevail! No other assertion here is needed.

In Michigan, our own Federal District Court Judge John Feikens, in Gibson et al v First Federal Savings and Loan Association, 347 F Supp 560, 562, in speaking of redress to any deprivation of civil rights under color of state law,

where state process is used to foreclose mortgages where state action is involved, that court said:

> "Judicial or executive action, combined with private action, has been held sufficient to find action under color of state law, Shelley v Kraemer, 334 US 1, 68 S Ct 836, 92 L Ed 1161 (1948). But not so here, for the nexus between the state action--possible foreclosure and execution of sale by the sheriff and the alleged taking by the defendant--is too remote. To hold that the taking is under color of law would subject every contract or mortgage to constitutional scrutiny. Although the mortgage in question may present legal questions under federal law, enforcement of that contract by the sheriff does not transform an illegal contract into an unconstitutional one." (emphasis added)

That is the bottom line in the instant case, specifically, that the contract is illegal. Moreover, the assertion of the contract being illegal would never have arisen as a federal question if the Respondents had voluntarily adhered to the provisions of the contract. In Charles McAllister et al., Respts., v Louis C. Drapeau, Impleaded, etc., Appt.(1939) 92 P2d 911, 125 ALR 800, 808, on the question of relief from an illegal contract, the California Supreme Court, In Banc, held:

> "Assuming that a contract is fraudulent, or against public policy, or illegal, still, where the parties to it are not in pari delicto, and where public policy is considered as advanced by allowing either, or at least the most excusable of the two, to sue for relief, relief may be given to him, either against the transaction by setting

it aside and restoring him to his original position, or even, in some cases, by enforcing the contract, if executory." Citing, Smith v Bach, 183 Cal 259, 191 P 14; Woodham v Allen, 130 Cal 194, 62 P 398; Daniels v Tearney, 102 US 415, 26 L ed 187.

The contract in the instant case is selected and printed as a mass contract by Respondents herein, and is the only contract offered for a sale of credit or extension of credit. The mortgagor is given no alternative choice of another contract by the instant mortgagee, and no negotiation is possible. The mortgagor is not "in pari delicto" with the mortgagee. Respondents assert they are "bound by law" under federal regulations to maintain an escrow account for the payment of taxes and insurance. (Appendix on Appeal--Appellant, Volume I, at 190a)

In controversy of Respondents assertions, Petitioner asserts that the regulations promulgated by the Federal Home Loan Bank Board do not contain any escrow requirement as to insured or guaranteed loans. Petitioner herein will present these and relevant matters in the next segment of her argument, under question 2.

The matter of a "covenant" should be resolved. The mortgagee (respondents herein) failed to perform the following conditions of the covenant:

(a) failed to pay insurance when due from escrow funds
(b) failed to pay taxes when due from escrow funds
(c) failed to hold the escrow funds without interest thereon, and instead invested said funds for profit to mortgagee only

(d) Failed to accept mortgagor's installment payment made on May 29, 1968, contrary to terms of mortgage note which allowed payment during period of 15 days, from May 15, 1968 to May 30, 1968, without penalty or late charge to mortgagor.
(e) Failed to estimate installments equal to the taxes and assessments and premiums next due, and instead estimated excessive amounts, and requiring payment of such excessive amounts under threats of foreclosure, an extortion racket for self-dealing.
(f) Failed to estimate such equal installments in amounts "less the sums already paid therefor" in violation of the covenant and agreement.
(g) Failed to inform mortgagor as to any "deficiency" if any existed, and commenced foreclosure proceedings where "escrow" account of mortgagor actually contained a surplus credit balance.
(h) Failed to render surplus escrow moneys to mortgagor by not crediting said amounts to mortgagor's principal balance in reduction of principal balance, where "escrow" funds were not utilized in a 12-month period.
(i) Failed to abide by statutory provision, in violation of said covenant and agreement, and commenced foreclosure proceedings where not authorized.

In DeGrasse v Verona Mining Co., (1915) 152 NW 242, 246; 185 Mich 514, the court said:

"A covenant is a promise, or agreement under seal, to do or not to do a particular thing, while the office of a condition is, generally, to indicate the terms upon which a certain right will arise, or continue, or be defeated." 20 Am Jur 2d, at 1, Covenant.

"A court will favor the construction of a provision as a covenant rather than a condition, in order that the consequences of a forfeiture of the estate may be avoided." Detroit U Railroad Depot & Station Co. v Fort St. U. Depot Co., 87 NW 214, 128 Mich 184

" * * * a condition is in the words of and binding upon both parties, while a covenant is in the words of the covenantor only." Langley v Ross, 1884, 20 NW 886, 55 Mich 163.

In the instant case, Petitioner (mortgagor) performed her covenant the performance of which was a condition to pay escrow funds to the mortgagee. The mortgagee failed to perform, and misused and mishandled said escrow funds, thereby defaulting in the conditions of the contract. The said covenant and agreement has a double operation therefore. 3A Corbin, Contracts, 638, and the non-performance or the failure or default or violation in the conditions of contract on the part of the mortgagee (escrow-holder) results in defeat or termination of the contract by the mortgagor (escrow-payor). Thus, the mortgagor may refuse to pay the escrow funds therefrom upon mortgagee's default or violation in the terms and conditions of the escrow clause, paragraph 2. of the mortgage contract.

"A condition precedent has been defined as a condition which must be performed before the agreement of the parties shall become a binding contract, or it may be a condition which must be fulfilled before the duty to perform an existing contract arises." 17 CJS, Contracts, 338. "A condition subsequent is one which, if performed or violated, as the case may be defeats the contract."

The condition subsequent is where the Respondents (mortgagee) failed to utilize the escrow funds properly, and violated the conditions of the

covenant and agreement, the remedy for which results in termination of the contract by the mortgagor who performed her covenant. In the instant case, the Petitioner-mortgagor paid escrow funds to the Respondents-mortgagee each and every month without fail. There was no default on the part of the Petitioner-mortgagor herein. The entire foreclosure action by the mortgagee (Respondents) was invalid, unauthorized, improper and illegal, and the court must set the entire foreclosure aside. In Michigan, under Michigan case law, a mortgagor cannot be heard unless the foreclosure is set aside. Stewart v Eaton, (1939) 287 Mich Rep 466.

"Escrow agreement to pool assets of joint venture * * * for purpose of * * * distribution in accordance with designated formula imposed on defendants the fiduciary obligations of trustees of trust, notwithstanding that agreement exculpated defendant from liability except for violation of terms of agreement." Sanet v Dworman, et al (1961) 223 NYS 2d 925

"Taxpayer does not suffer injury from a tax until tax has been assessed and has become debt or lien, at which time he has remedy at law, and, in proper case, in equity to conserve his rights." (emphasis added) Congregation Ben Jacob v Detroit, 299 Mich 652.

The "escrow" money belongs to the mortgagor. In the instant case, the mortgagee foreclosed on mortgagor's money, which was not a debt or not an indebtedness. The foreclosure by advertisement statute for Michigan, provides as follows:

MCLA 600.3201 et seq., MSA 27A.3201, et seq.
Sec. 3201 Foreclosure of mortgages containing power of sale; right

"Every mortgage of real estate, containing therein a power of sale, upon default being made in any condition of such mortgage, may

be foreclosed by advertisement, in the cases and in the manner hereinafter specified.
600.3204. To entitle any party to give a notice as hereinafter prescribed, and to make such foreclosure, it shall be requisite: (emphasis added)
(1) That some default in a condition of such mortgage shall have occurred, by which the power to sell became operative; * * * ."

Thus, it is clear that only a party is entitled to make such foreclosure. The mortgagee-escrow-holder is not a party to the "escrow." While the mortgagor is the grantor of the "escrow," there is no grantee. The donor or grantor pays the "escrow" to the escrow-holder on the condition that the funds be delivered to the donee or grantee. (The donee-grantee is merely illusory, and is not a party to the mortgage agreement and covenant, and not a party to the escrow.) The liability for the payment of taxes and insurance remains the liability of the mortgagor as title-holder of the real property, in fee simple, even though said mortgagor has deposited escrow funds with the mortgagee-escrow-holder for the payment of said liabilities. The instant mortgage contract disallows and prohibits and inhibits a mortgagor and a mortgagor is prevented from complying with laws of any governmental assessment of taxes. It is an illegal contract.

Escrow is not an "indebtedness" owed to a mortgagee. It is not "owed" to the mortgagee unless the mortgagee advances its funds for payment of taxes and insurance and thereby creating a valid deficiency. Future taxes and insurance are not a valid deficiency, and certainly not a fixed imposed debt where not yet assessed or billed.

"A mortgagee will not be allowed to execute the power of sale contained in his mortgage so as to compel the mortgagor to pay more than he owes or forfeit his estate." Sanford v Flint, (1871) 24 Mich 26.

Since there is no grantee to the "escrow" there cannot be a valid "escrow." The Court should take this opportunity to separate the mortgage agreement as to the relationship between the parties to the "escrow." If it were a true escrow, the agent has limited vested rights in the escrow which only entitle him to insure its proper disposition. To allow the mortgagee the construction of the statute to foreclose on future obligations in the form of prepayment of taxes, insurance and other charges due in the future, and without any limitation or restrictions for a mortgagee, would be an embarrassing condition of a mortgage scheme. The Michigan State legislature enacted P. A. 1964, No. 156, effective January 1, 1965, known as the"Savings and Loan Act" Title 23 - Banking and Private Finance: MSA 23.540 (377) and MCLA 489.777 Sec 377, which provides as follows:

"Prepayment of taxes and expenses; method of keeping accounts.
Sec. 377. An association may require the borrower to pay monthly in advance, in addition to interest or interest and principal payments, the equivalent of 1/12 of the estimated annual taxes, assessments, insurance premiums, and other charges upon the real estate securing a loan, or any of such charges, so as to enable the association to pay such charges as they become due from the funds so received. The amount of the monthly charges may be increased or decreased so as to provide reasonably for the payment of the estim-

ated annual taxes, assessments, insurance premiums, and other charges. The association may carry such funds in trust in an account or may credit the same to the indebtedness and advance the money for taxes, insurance or other charges. * * * " (emphasis added)

The legislative intent is questionable as to the purpose of this statute. It is axiomatic, absent a clear showing to the contrary, that a legislature uses legal terms in their strict legal meaning when incorporating them into a statutory scheme. At the very least, the "in trust" characterization of this mortgagor-mortgagee arrangement is in violation of the body of escrow law. Similarly, the legislature apparently has overlooked a proper remedy so that the lending institution as depositary of the funds may now deprive the proper party, even though said party is only illusory, of its benefits and "credit the same to the INDEBTEDNESS * * * ". Further, said statute is ambiguous, overbroad on its face as applied, is in conflict with the common law, and is in conflict with federal regulations, 12 CFR 545.6-1 promulgated by the Federal Home Loan Bank Board, 12 U.S.C.A. 1461, 1464, et seq. Said Michigan statute is therefore unconstitutional, and the Court should void the same.

See also 28 Am Jur 2d, Escrow, at 24, Unauthorized delivery. "It is the general rule that where an instrument, or money, placed in escrow is thereafter delivered by the escrow holder in violation of, or without compliance with, the terms or conditions of the escrow agreement, such attempted delivery is inoperative and no title or rights pass by virtue of the second tradition, (emphasis added) for the

reason that in legal contemplation there has been no effective delivery." Calhoun County v American Emigrant Co. 93 US 124, 23 L ed 826.

It is interesting to note that the Supreme Court of the United States in Citizens Nat. Bank v Davisson (1913) 239 US 212, 57 L ed 1153, 33 S Ct 625, Ann. Cas. 1915A, 272, says that the effect of the deposit in escrow was to constitute the bank a custodian or stakeholder for the benefit of both parties, holding the deposit without right or interest in it, bound above all things not to take sides between the parties, and answerable ultimately to the one or the other according to their respective rights as between themselves. (emphasis added)

THIS RAISES THE QUESTION OF WHO HAS THE RIGHT TO FUTURE TAXES (in the form of "escrow" moneys paid in advance) PRIOR TO ANY ASSESSMENT OR BILLING AND WHERE NO TAXES ARE DUE AND NONE ARE UNPAID.

(New) Limitation on Requirement of Advance Deposits in Escrow Accounts

Sec. 10. A lender, in connection with a federally related mortgage loan, may not require the borrower or prospective borrower --

(1) to deposit in any escrow account which may be established in connection with such loan for the purpose of assuring payment of taxes, insurance premiums, or other charges with respect to the property * * * in excess of a sum that will be sufficient to pay such taxes, insurance premiums and other charges * * *

(2) to deposit in any such escrow account in any month beginning with the first full installment payment under the mortgage a sum * * * in excess * * * . (emphasis added)

88 Stat. 1728; Act of January 2, 1976, Sec 8, 89 Stat. 1158-1159; 12 U. S. C. 2609.

THE ABOVE STATUTE (enacted by Congress) RAISES THE QUESTION OF WHAT IS "IN EXCESS" OF AN UNKNOWN AMOUNT CONTINGENT UPON A FUTURE ASSESSMENT AND BILLING OF ADVANCE PAYMENT OF TAXES?

Respondents admit they invest for profit the escrow moneys collected on mortgage loans. Respondents herein also required excessive "escrow" labeled as "shortage of requirements" in the instant case. 12 U. S. C. A. 1464, (b) (1), et seq., permits a savings and loan association to raise capital in in the form of such savings deposits, shares, or other accounts, for fixed, minimum, or indefinite periods of time, as savings accounts upon issuance of such passbooks, time certificates of deposit, or other evidence of savings accounts as are so authorized.

However, the courts have ruled that,

> "Capital of federal savings and loan associations may only be raised through payments into so-called savings accounts plus earnings accredited thereto for which depositor acquires a share interest in in capital of association equivalent to withdrawal value of the interest, and legal relationship resulting is not that of debtor and creditor, and his sole claim against association is as a shareholder. (emphasis added) Wisconsin Bankers Ass'n v Robertson, D.C.D.C, 1960, 190 F.Supp 90, affirmed 294 F 2d 714, 111 U.S. App D.C. 85, cert den 82 S Ct 381, 368 US 938, 7 L Ed 2d 338, reh den 82 S Ct 477, 368 US 979, 7 L Ed 2d 441.

THIS RAISES THE QUESTION "IS 'ESCROWING' THE RAISING OF CAPITAL WHERE THE LEGAL RELATIONSHIP BETWEEN THE ESCROW-PAYOR AND THE ESCROW-HOLDER IS NOT THAT OF DEBTOR AND CREDITOR, IN THE ABSENCE OF A LEGAL GRANTEE TO THE ESCROW?"

It takes only a minimum imagination for the Board of Directors of a lending institution, already insolvent, to raise capital through "escrowing" on mortgage loans by using threats of foreclosure unless "shortage of requirements" as estimated by the mortgagee are met by mortgagors, and which said alleged "shortage" is not a deficiency and has not been expended by the mortgagee. The mortgagee requires the alleged "shortage" in advance several months prior to any anticipated disbursements for taxes and insurance on the real property mortgaged. For example, by conservative figures:

10,000 mortgage loan accounts
X $200.00 excessive escrow requirements
$2,000,000.00

Wolla!!! A magical two million dollars suddenly are fattening the coffers of the lending-institution-mortgagee, who "raised capital" by refusing to accept regular payments of principal, interest and 1/12th escrow for a monthly installment, and thereby declaring the mortgage in default unless the mortgagor pays the excessive escrow labeled "shortage of requirements." The paramount intent of the lending institution is to raise capital to make a profit on other people's money. The mortgagor, who pays the "escrow" to the mortgagee, gets nothing; not even receipts for taxes; while the mortgagee invests said "escrow" funds and self-deals. The mortgagee also fails to pay the taxes and insurance when due, asserting "we are bound by law to collect and require escrow, but we are bound to do nothing with the escrow funds." This is in violation of 12 U.S.C.A. 1464, et seq. and 12 U.S.C. 2609.

* * * * * * * * *

The next segment of Petitioner's argument discusses the illegality of the contract under federal law.

2. Where the Michigan Court of Appeals and the Michigan Supreme Court, after submission of part of the case to a jury (Count IV - Breach of Fiduciary Duty), and where Petitioner was prevented and precluded from submitting essential material facts pertinent to the whole of the case as to Mortgagee's misconduct in effecting a foreclosure by advertisement where mortgagor was not in default of said mortgage contract, and which the lower court refused to hear any of mortgagor's testimony of certain material facts essential to any kind of decision pertaining to breach of fiduciary relationship between mortgagor and mortgagee, and where mortgagee foreclosed by advertisement on mortgagor's property where mortgagor was not in default of the mortgage contract but that the mortgagee had demanded excessive "escrow" moneys disputed by the mortgagor, for payment of future taxes and insurance, and that mortgagee had repeatedly failed to pay taxes when due on mortgagor's property with mortgagor's "escrow" funds in the possession of the mortgagee and where mortgagee admitted utilizing said "escrow" funds for other purposes and profitting to only mortgagee's benefit, and by the mortgage contract inhibiting mortgagor from paying her own liabilities as to taxes and insurance and thereby inhibiting mortgagor from complying with laws, regulations, ordinances of governmental authorities, while mortgagee is mishandling mortgagor's "escrow" funds, and the jury finds the defendant-mortgagee "not guilty" and fails to rule on whether a trust or fiduciary relationship exists between an "escrow-holder-mortgagee" and an "escrow-payor-mortgagor" where said jury failed to follow the court's instructions, and the Michigan Court of Appeals and the Michigan Supreme Court affirm that the "foreclosure was licit" where mortgagor was not permitted to offer material and essential facts because the court had previously deprived Petitioner the opportunity to testify and present proofs that she was not in default of the mortgage, and where the court allowed the mortgagee

to proceed with the foreclosure in the absence of establishing any debt, and the jury was not given the opportunity to hear any testimony relative to the wrongful foreclosure, and the Michigan Court of Appeals and the Michigan Supreme Court has taken judicial notice of erroneous material facts essential to its decision and from the erroneous facts thus judicially noticed and by way of inference has drawn conclusions from such erroneous facts to support that "the foreclosure was licit" where Petitioner-mortgagor wad denied and deprived of the opportunity to submit material and essential facts that she was not in default of the mortgage terms of the contract, and that she suffered damages as a result of the wrongful foreclosure where she was not in default and no debt was established, and that the judiciary permitted the enforcement of an illegal contract by Sheriff's sale for the purpose of taking Petitioner's property, is State action involved under color of law and has Petitioner been deprived of her right to a trial by jury guaranteed by the Seventh and Fourteenth Amendments to the Constitution of the United States on the grounds that the facts judicially noticed effected the wrongful foreclosure where mortgagor was not in default and mortgagor was not permitted to present said erroneous judicial notice to the jury and thus Petitioner has been denied the opportunity to present facts on a theory of recovery of damages so wrongfully sustained by the wrongful foreclosure where the court permitted the mortgagee to proceed on the wrongful foreclosure?

THE CONTRACT IS ILLEGAL

By paying "escrow" moneys to the mortgagee, pursuant to paragraph 2 of the mortgage covenant and agreement, and when paragraphs 2, 3, 4, 5, and 7 are read together, the mortgagor is inhibited

and prevented from complying with any governmental law involving the payment of taxes. After mortgagor paid "escrow" moneys to the mortgagee as estimated by the mortgagee, and mortgagee failed and neglected to pay taxes and insurance when due, while mortgagee invests said "escrow" funds for profit, and subsequently mortgagee requires mortgagor to pay excessive "escrow" disputed by the mortgagor, and the court permitted the mortgagee to proceed on the foreclosure, the Sheriff conducted the mortgage sale without notice to ~~mortgagee~~ MORTGAGOR, on mortgagee's claims for "escrow" for future taxes and insurance not yet assessed, not yet billed, and not yet due.

Paragraph 8 of the instant contract involved, (See Statement of the Case, pages 20-23, infra) provides:

> "In the event of default in the payment of said indebtedness, or any part thereof, or in the performance of any of the covenants or conditions hereof, mortgagee may, without notice, at its option, declare the entire indebtedness secured hereby due, * * * "

No notice was given to mortgagor as to the Sheriff's sale occurring on October 1, 1968. "It is the general rule that a valid sale cannot be made under a power in a mortgage or deed of trust without giving such notice as is legally required, * * *." 55 Am Jur 2d 716. In the instant case, the "without notice" provision in the mortgage agreement is in violation of Michigan Statute, MCLA 600.3204; MSA 27A.3204, which requires notice be given. In this case the mortgage sale was advertised with sale date of August 20, 1968. There were at least six (6) week-to-week adjournments and which mortgagor was not given any notice. Said mortgage sale occurring on October 1, 1968, without notice, was contrary to and in violation of statutory provisions.

In Bronson v Kinzie, et al, 1 How (US) 311, 11 L Ed 143, this Court said:

> "But, even under this covenant, the sale made by the party is so far subject to the supervision of the court, that it will be set aside, and a new one ordered, if reasonable notice is not given, or the proceedings be regarded, in any respect, as contrary to equity and justice. * * * for every state has the power to prescribe the legal and equitable obligations of a contract to be made and executed within its jurisdiction. It may exempt any property it thinks proper from sale, for the payment of a debt; and may impose such conditions and restrictions upon the creditor as its judgment and policy may dictate. And all future contracts would be subject to such provisions." at 321.

Further, the Court said,

> "The laws of a state, regulating the process of its courts, and prescribing the manner in which it shall be executed, of course, do not bind the courts of the United States, whose proceedings must be governed by the acts of Congress. * * * And, although such state laws may have been so adopted, yet they are inoperative and of no force, if in conflict with the Constitution or an act of Congress. * * * Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. * * * But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing." at 316, 317. "The only

question under this act as to its constitutionality must be, whether it impairs the obligations of contracts entered into before it was passed." at 326.

The extant controversy in the instant case, raising a federal question, is in the interpretation of federal regulations promulgated by the Federal Home Loan Bank Board, 12 U.S.C.A. 1464, et seq., 12 CFR 545.6-1 et seq., (See Appendix "CC", infra, App. 117) and is herein set forth as follows:

The three (3) catagories of which provide authorization of mortgage loans are:

1. not an insured or not guaranteed loan, 80 percent of the value, which shall be 90 percent if the requirement of one-twelfth prepaid or advance payments for taxes and assessments, paid to the association, is met. (See paragraph (4) (iii)

2. an insured loan, requirements of paragraph (4) (iii) not applicable.

3. guaranteed loan, requirements of paragraph (4) (iii) not applicable.

Paragraph (4) (iii), as amended 1977, provides: "The loan contract requires that, in addition to interest and principal payments on the loan, the equivalent of one-twelfth of the estimated annual taxes and assessments on real estate security be paid monthly in advance to the association; * * *"

Therefore, the Court can see that prepaid or advance payments for taxes and assessments are not required on any insured or guaranteed loan; but, that on a loan which is 90 percent of the value (of real property mortgaged) the lender

may require one-twelfth prepaid or advance payments for taxes and assessments be paid to the association by monthly installment payments, where the mortgage loan is not insured or guaranteed.

Thus, no "escrow" or "escrowing" is required on any insured or guaranteed loan, as set forth in said Code of Federal Regulations, 12 CFR 545.6 et seq. (Appendix "CC", infra)

In the instant case, this was a conventional mortgage loan insured by Mortgage Guaranty Insurance Corporation, Milwaukee, Wisconsin, as required by the mortgagee, Respondents herein. The mortgage covenant and agreement containing the said paragraph 2 requiring mortgagor to pay "escrow" to the mortgagee is contrary to said federal regulations, which Respondents rely on, erroneously. The said contract is substantially against the federal regulation. True, the mortgage covenant and agreement does not provide for "mortgage insurance on the loan," but mortgagees effect the charges paid by the mortgagor by including it either in the percentage rate of interest as a hidden-charge arrangement, or by requiring "escrow premiums" for said mortgage insurance on the loan. In the instant case, the mortgage insurance is shown in the "Loan Settlement Statement" as follows: (Also see App. 96, infra, Appendix "N", App. 91, infra)

Principal and interest	$103.81
Tax escrow	22.25
Insurance Escrow	4.00
MGIC (Mortgage Guaranty Insurance Co.) Premium	3.44
	$133.50

Respondents have admitted that the "Loan Settlement Statement" is part of the contract. The three (3) items of "escrowing" are a tying-in arrangement in violation of the Sherman and Clayton Acts, 15 U.S.C.A. Section 1, et seq. (See

Appendices "GG", "HH", "II" and "JJ", infra, at App. 120-122)

This court has not hestitated in striking down contracts involving practices which are deemed to be unlawful in and of themselves. Among those are: price fixing, United States v Socony-Vacuum Oil Co., 310 US 150, 210; division of markets, United States v Addyston Pipe & Steel Co., 85 F 271, Aff'd, 175 US 211; group boycotts, Fashion Originators' Guild v Federal Trade Comm'n, 312 US 457; and tying arrangements, International Salt Co. v United States, 332 US 392.

In Northern Pac. R. Co. v United States, 356 US 1, 4, this Court said,

"The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." Although this prohibition is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which "unreasonably" restrain competition. (Citations omitted) * * * For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, ***

Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed "tying agreements serve hardly any purpose beyond the suppression of competition." Standard Oil Co. of California v United States, 337 US 293, 305-306. "They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. * * * (emphasis added) For these reasons "tying agreements fare harshly under the laws forbidding restraints of trade." Times-Picayune Publishing Co. v United States, 345 US 594, 606. They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of interstate commerce is affected." International Salt Co. v United States, 332 US 392, Cf. United States v Paramount Pictures, 334 US 121, 156-159; United States v Griffith, 334 US 100.

In the instant situation and conditions, the tying-in arrangement is a control and dominance over the huge amounts (collectively) of tax money collected by the lending institutions through "escrowing." This is done by leverage of threats of foreclosure, as in the instant case. Prior to that the tying-in arrangement is effectively implemented by the mortgagee's erroneous assertions that they are "bound by law to collect escrow," and there is no such law to support the mortgagee-lending-institution's contentions. The paramount intent of the lending-institution is to obtain control of the "escrow" funds, and the paramount intent is the control of such moneys, to self-deal with other people's money.

While your Petitioner complained when the Respondents failed to pay her taxes and insurance when due, the covenant and agreement inhibited and prevented Petitioner from doing just that, paying taxes and insurance; not only does the contract prevent Petitioner from complying with governmental laws of paying taxes when due, the contract also prohibits Petitioner from paying taxes delinquent where the Respondents have failed and neglected to pay taxes. Further, the tying-in arrangement occurs through the insurer and the mortgagee (both) requiring "escrow" to be paid by the mortgagor, otherwise mortgage insurance on the loan is not available. To think of the leverage those billions of tax dollars have over the local and State governments, where the lending institutions, collectively, are in predominating control, economically and powerfully, in restraint of commerce, where the organized lending institutions can simply fail to pay taxes for a period of time of, say, 26 to 33 months pursuant to statutory law, MSA 7.104; MSA 7.105, prior to the State attaching a lien against the real property for unpaid taxes, that kind of power is certainly frightening, to say the least.

The mortgagor is given no choice or alternative; it is not something that the mortgagor can negotiate with the mortgagee on. The mass contract is signed by the mortgagor, unwittingly, unknowingly, unintelligently, unvoluntarily, because the mortgagee "requires escrowing" tied in with the extension of credit. Where is there more economic and political power and by restraint of commerce? The answer is: that is the pinnacle of power; displaced power; but nevertheless the pinnacle of power.

The Home Owners Loan Act (HOLC) of 1933 and the National Housing Act of 1934 resulted in Executive Order No. 8843 (August 9, 1941) entitled "Control

of Consumer Credit" as follows, in part:

"Whereas a large volume of credit is being devoted to financing and refinancing purchases of consumers' goods and services through extensions of credit that usually are made to individuals and to a large extent are on an instalment payment basis; and
* * *
"Whereas the extension of such credit in excessive volume tends to generate inflationary developments of increasing consequence * * *
"Whereas the public interest requires control of the use of instalment credit or financing and refinancing purchases * * *
"Whereas it is appropriate that such credit be controlled and regulated through an existing governmental agency which has primary responsibilities with respect to the determination and administration of national credit policies:
"Now, Therefore, by virtue of the authority vested in me * * * and by virtue of all other authority vested in me, and in order * * * to protect the national economy, it is hereby ordered as follows:
"Sec. 1. Administration. (a) * * * The Board of Governors of the Federal Reserve System (hereinafter called the Board) is hereby designated as the agency through which transfers of credit between and payments by or to banking institutions * * * which constitute, or arise directly or indirectly out of any extension of credit of a type set out in section 2 (a) of this order shall be investigated, regulated and prohibited. * * *
"Sec. 2. Regulations. (a) Whenever the Board shall determine that such action is necessary or appropriate for carrying out the purposes of this order, the Board shall prescribe regulations with respect to transfers and payments which constitute, or arise directly or indirectly out of, any extension of installment credit for the purpose of purch-

asing or carrying any consumers' durable goods except a residential building in its entirety; and the Board may in addition, to the extent deemed by it to be desirable and feasible in order to prevent evasion of such regulations as may be so prescribed or in order to control forms of credit the use of which might defeat the purposes of this order and such regulations, prescribe regulations with respect to transfers and payments which constitute, or arise directly or indirectly out of, (1) any other extension of instalment credit, or (2) any other extension of credit for the purpose of purchasing or carrying on any consumers' durable good, or (3) any other extension of credit in the form of a loan other than a loan made for business purposes to a business enterprise * * * . Such regulations may be prescribed by the Board at such times and with such effective dates as the Board shall deem to be in accordance with the purposes of this order.

"(b) Such regulations may from time to time, originally or by amendment, regulate or prohibit such transfers and payments or exempt them from regulation or prohibition and may classify them according to the nature of the transactions or goods or persons involved or upon such other basis as may reasonably differentiate such transfers and payments for the purposes of regulations under this order * * * may prescribe appropriate requirements * * * as to the form, contents, or substantive provisions of contracts, liens, or any relevant documents; may prohibit solicitations by banking institutions which would encourage evasion or avoidance of the requirements of any regulation * * * under this order * * *

"(c) (Unlawful Transfers and Payments) On or after the effective date of any regulation prescribed by the Board with respect to any extension of credit * * * and notwithstanding the provisions of any other proclamation, order, regulation * * * all transfers and payments which are in violation

of such regulation shall be and hereby are prohibited to the extent specified in such regulation.

"(d) (Enforcement of Contracts). Neither this order nor any regulation issued thereunder shall affect the right of any person to enforce any contract, except that after the effective date of any such regulation every contract which is made in connection with any extension of credit and which violates, or the performance of which would violate, any provision of such regulation * * * and every lien, pledge, seller's interest in a conditional sale, or other property interest, subject to the provisions of such contract or created in connection therewith, shall be unenforceable by the person who extends such credit or by any person who acquires any right of such person in such contract;provided that such disability shall not apply to any person who extends such credit, or acquires such right for value, in good faith and without knowing or having reason to know the facts by reason of which the making or performance of such contract was or would be such a violation.

" Sec. 3. Reports. * * *

" Sec. 4. Definitions. For the purposes of this order * * * the following terms shall have the following meanings * * * (a) (Person). "Person" has the meaning set forth in section 5(b) of the act of October 6, 1917, as amended. (Note. Sec. 5(b) defines "person" as * * * an individual, partnership, association, or corporation." * * *

"(b) (Transfers and Payments). "Transfers and payments" means "transfers of credit between and payments by or to banking institutions."

"(c) (Banking Institutions). "Banking institutions" means any person engaged as principal. agent, broker, or otherwise, in the business of making or holding extension of credit and includes, without limitation, any bank, any loan company, and finance company, or any other person engaged in the business of making or holding extensions of credit whether as a vendor of consumers' durable

goods or otherwise.

"(d) * * *

"(e) (Extension of Credit). "Extension of Credit" means any loan or mortgage, any instalment purchase contract, any conditional sales contract, or any sale or contract of sale under which part or all of the price is payable subsequent to the making of such sale or contract; * * * any contract creating any lien or similar claim or property to be discharged by the payment of money; * * * or any extension of credit upon the security of, any obligation or claim arising out of any of the foregoing; and any transaction or series of transactions having a similar purpose or effect.

"(f) * * * (g) * * *

"Sec. 5. Penalties. Whoever willfully violates or knowingly participates in the violation of this order or of any regulation precribed hereunder, shall be subject to the penalties applicable with respect to violations of section 5(b) of the said act of October 6, 1917, as amended * * *

FRANKLIN D. ROOSEVELT

THE WHITE HOUSE,
August 9, 1941.

Thus, it is clear from the above " * * * every *** property interest, subject to the provisions of such contract or created in connection therewith, shall be unenforceable by the person who extends such credit or by any person who acquires any right of such person in such contract * * * " where any such contract which is made in connection with any extension of credit and which violates or the performance of which would violate any provision of such regulation. The contract in the instant case violates 12 CFR 545.6-1, et seq. for the reason that the mortgage loan was insured, and no "escrow" is required on any insured or guaranteed mortgage loan. The the contract, of itself, is unenforceable, and the foreclosure is illegal.

The mortgagor is boxed-in on the covenant and agreement with no place to go except to continue to pay "escrow" as a condition, no matter how and where the mortgagee violates the covenant or the conditions of the covenant, or where the mortgagee violates or fails to perform such conditions as paying taxes when due after the mortgagor has paid "escrow" moneys to the mortgagee. In fact, the only condition the mortgagor performs is to "pay." As a "condition" of the contract, failure of the mortgagor to pay "escrow" to the mortgagee results in termination of the contract by foreclosure even when the mortgagee has failed and neglected to pay the taxes with mortgagor's "escrow" funds. If the mortgagor does not continue to pay "escrow" when the mortgagee is failing to utilize the escrow funds for payment of taxes, the result is foreclosure. In the instant case, where the mortgagor objected to mortgagee's mishandling of "escrow", the mortgagee foreclosed, sanctioned by state action of refusal of injunctive relief to the mortgagor, and further sanctioned by state action in the Sheriff's sale, without notice. Further, sanctioned by state action of the Michigan Court of Appeals affirming that "acceleration of the debt" results and is proper. Further, sanctioned by state action of the Michigan Supreme Court in its pronouncement that "the foreclosure is licit." Where the foreclosure is sanctioned by the State, state action is involved, and Petitioner has been denied due process of law and denied equal protection of the law in violation of the Fift' and Fourteenth Amendments to the United States Constitution.

Further, the said contract violates Petitioner's civil rights by deprivation of right to pay taxes, 42 U.S.C.A. 1983 (Appendix "DD" infra, App. 118), and she has the right to equal protection under valid laws so as not to be subjected to a conspiracy to

interfere with her civil rights. 42 U.S.C.A. 1985, et seq. (Appendix "EE" infra, App. 119-120)

By the mortgagee-lending-institution, Respondents herein, failing to adhere to the terms and conditions of said instant contract, this controversy became a federal question when the Respondents foreclosed because Petitioner said "Please, I want to pay my own liabilities of taxes and insurance to assure the timely payment of same and so that I would have receipts, and which you, as mortgagee, have failed and refused to do, together with requiring excessive escrow amounts which you refuse to substantiate with receipts." When Petitioner-mortgagor asked the Respondents-mortgagee for a "release" as to the escrow clause, to enable her to pay her own tax and insurance bills promptly, and without answering to her request, Respondents-mortgagee foreclosed by advertisement, on May 23, 1968, where by the terms of the mortgage note said mortgagor could make her current May 1968 payment during the period of fifteen (15) days from May 15 through the 30th. Mortgagee refused mortgagor's tendered payment on May 29, 1968, because of the foreclosure and that no escrow moneys were included in said payment of principal and interest on May 29, 1968. Petitioner-mortgagor was not in default of any conditions of the mortgage on May 23, 1968, the date of foreclosure publication. On April 26, 1968, prior to the foreclosure, mortgagor disputed mortgagee's requirements of excessive escrow, but mortgagor's installment payment on April 26, 1968, was allocated by the mortgagee as follows:

Principal and interest . .	$103.81
Additional principal . . .	10.17
Escrow (as estimated by the mortgagee)	82.19
Total payment . . .	$196.17

In Shelley v Kraemer, 334 US 1, this Court said,

"That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court. That principle was given expression in the earliest cases involving the construction of the terms of the Fourteenth Amendment. Thus, in Virginia v Rives, 100 US 313, 318 (1880), this Court stated: "It is doubtless true that a State may act through different agencies, --either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another." In Ex parte Virginia, 100 US 339, 347 (1880), the Court observed: "A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way." In the Civil Rights Cases, 109 US 3, 11, 17 (1883), this Court pointed out that the Amendment makes void "State action of every kind" which is inconsistent with the guaranties therein contained, and extends to manifestations of "State authority in the shape of laws, customs, or judicial or executive proceedings." Language to like effect is employed no less than eighteen times during the course of that opinion."

"Similar expressions, giving specific recognition, to the fact that judicial action is to be regarded as action of the State for the purposes of the Fourteenth Amendment, are to be found in numerous cases which have been more recently decided. In Twining v New Jersey, 211 US 78, 90-91 (1908), the Court said: "The judicial act of the highest court of the State, in authoritatively construing and enforcing its laws, is the act of the State." In Brinkerhoff-Faris Trust & Savings Co. v Hill, 281 US 673, 680 (1930), the Court, through Mr. Justice Brandeis, stated: The federal guaranty of due process extends to state action

through its judicial as well as through its legislative, executive or administrative branch of government." Further examples of such declarations in the opinions of this Court are not lacking." * * * The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment. Brinkerhoff-Faris Trust & Savings Co. v Hill, supra. Cf. Pennoyer v Neff, 95 US 714 (1878) * * *

"It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process." (emphasis added) Erie R. Co. v Tompkins, 304 US 64 (1938) * * *

"The enforcement of the restrictive agreements by the state courts in these cases was directed pursuant to the common-law policy of the States as formulated by those courts in earlier decisions. Swain v Maxwell, 355 Mo 448, 196 SW 2d 780 (1946) Koehler v Rowland, 275 Mo 573, 205 SW 217 (1918) See also Parmalee v Morris, 218 Mich 625, 188 NW 330 (1922). Cf. Porter v Barrett, 233 Mich 373, 206 NW 532 (1925)

"The judicial action in each case bears the clear and unmistakable imprimature of the State. We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. Nor is the Amendment ineffective simply because the particular pattern * * *, which the State has enforced, was defined initially by the

terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. (emphasis added) And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.

"We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. * * *

Thus, similarly, where the Michigan Supreme Court pronounces that "the foreclosure was licit" and thus, granting judicial enforcement of the instant restrictive covenant which precludes, prohibits, prevents and inhibits a mortgagor from complying with governmental laws such as paying taxes, state action is involved by denying this Petitioner the equal protection of the laws. This Court should, therefore, reverse the decision of the Michigan Supreme Court and enter its appropriate Declaratory Judgment.

> "The obvious advantage of the waiver provisions to the creditor is to free him from cumbersome and time-consuming foreclosure procedures. Undeniably, there is a potential for abuse attendant to any such grant of authority, but, by the terms of the agreement it is incumbent upon the debtor to initiate injunctive proceedings should he feel that foreclosure has been undertaken erroneously or in bad faith." (emphasis added) Global Industries, Inc. v Harris, et al (1974) 376 F Supp 1379

The instant case involves State assessment of taxes as an ultimate fact, and is a significantly close

nexus between the challenged conduct of Respondents who gain possession of the escrow funds allocated and to be paid over as County and school taxes (and other local taxes), and which said school taxes are appropriated by the State Legislature. The holding of the reversal of setting aside a foreclosure in Northrip v Federal National Mortgage Assoc, 527 F 2d 23 (1975) and that the existence of a statute which permitted a mortgagee to foreclose by advertisement rather than by judicial process did not constitute state action, as such, is in conflict with this Court's pronouncements in Shelley v Kraemer, supra, and Bronson v Kinzie, et al, supra.

As said before, herein, if the Respondents had voluntarily adhered to the provisions or conditions of their own contract, a mass contract, prepared by Respondents, as mortgagees, and which the mortgagor has no area of participation in the preparation of said contract, the federal issues and questions would not have been before the court. In the instant case, Petitioner-mortgagor performed her covenant the performance of which is to pay "escrow" to the mortgagee. This mortgagor did pay "escrow" each and every month without fail, and she paid additional sums into the "escrow" account, in dispute of Respondents' excessive requirements. The Respondents believe themselves to have great flexibility in paying taxes with mortgagors' "escrow" funds to the extent of delaying payment of taxes for two (2) years or so after taxes are due; and yet Respondents foreclosed on "escrow" moneys only, for future taxes and insurance before such items are assessed, before any billings, and in an excessive amount which, obviously, is to fatten the coffers of the Respondents-mortgagee for self-dealing purposes, since Respondents consistently failed to pay Petitioner's taxes and insurance when due, while inhibiting Petitioner from paying her own liabilities of taxes and insurance. The Courts have a duty to declare that diabolical

scheme unlawful, and that the said mortgage contract is illegal and unenforceable. The lower court erred by denying injunctive relief to Petitioner-mortgagor, and by refusing to hear the facts from this mortgagor, and allowing Respondents-mortgagee to proceed with the foreclosure.

> "The fundamental requisite of due process of law is the opportunity to be heard." Grannis v Ordean, 234 US 385, 394, 34 S Ct 779, 783, 58 L Ed 1363 (1914).
>
> "The hearing must be 'at a meaningful time and in a meaningful manner.'" Armstrong v Manzo, 380 US 545, 552, 85 S Ct 1187, 1191, 14 L Ed 2d 62 (1965); Goldberg v Kelly, 397 US 254, 267, 90 S Ct 1011, 1020, 25 L Ed 2d 287 (1970).
>
> "Newspaper publication of property owner's right to hearing at which he or she may contest State's claim that it may take property for non-payment of taxes is not constitutionally adequate notice of right with respect to person whose name and address are known or very easily ascertainable. MCLA 211.61a, 211.63, 211.66; MCLA Const. 1963, art. 1, sec. 17; U.S.C.A. Const. Amend. 14. (emphasis added) Dow et al, v State of Michigan, (1976) 396 Mich 192, 240 NW 2d 450.

In McIntosh v Groomes, 227 Mich 215, the Michigan Supreme Court said,

> "The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are subordinate. To arrive at a proper interpretation of particular language, the entire contract must be considered. (emphasis added) "'Every word in the agreement must be taken to have been used for a purpose, and no word should be rejected as mere surplusage if the court can discover any reasonable purpose

thereof which can be gathered from the whole instrument.'" 6 R. C. L. p. 838.

"It is also a rule of construction that every word and sentence shall be given effect where it is possible to do so without destroying the manifest intent of the parties." Switzer v Manufacturing Co. 59 Mich 488, 497.

In the instant mass contract involved, it should be clear to this Court that the paramount intent of the Respondents-mortgagee is to collect "escrow" funds as a condition for the extension of credit, a form of capitalizing with other people's money, which results in a preponderating dominance of leverage (collectively by over 5,000 savings and loan associations, nationally), economically, politically and socially. Northern Pac. R. Co. v United States, 356 US 1, 4, supra; United States v Loew's Inc. 371 US 38. --- If this were untrue, the contract would have provided for the mortgagor to pay taxes and insurance upon mortgagee's failure to do so. But, instead, the said contract inhibits and prevents the mortgagor from paying her her own liabilities, except in the way of escrow moneys to the mortgagee to control and in restraint of commerce and by a tying-in arrangement with the insurer (MGIC) on the mortgage loan, in violation of 12 CFR 545.6-1; 12 U.S.C.A. 1464 et seq., Sherman and Clayton Acts, 15 U.S.C.A. 1, et seq., International Salt Co. v United States, 332 US 392; Times-Picayune Publishing Co. v United States, 345 US 594, 606. Fortner Enterprises v U.S. Steel, 394 US 495.

"The 'actual owner * * * of real estate, chattels or money' has 'property interest protected by procedural due process." Board of Regents v Roth, 408 US 564, 92 S Ct 2701, 33 L Ed 2d 548 (1972). "The constitutional requirement of opportunity for some form of hearing before deprivation of a protected interest, of course,does not depend" upon a balancing of the importance of the interest and the

nature of the subsequent proceedings. That the hearing "is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing" prior to deprivation of "any significant property interest." Boddie v Connecticut, 401 US p. 379, 91 S Ct p. 786; Dow et al v State of Michigan, 396 Mich 192, 240 NW 2d 450.

In the instant case, mortgagor (Petitioner) was required to make only one installment payment per month. The Respondents had estimated that $82.19 per month was to be paid into the "escrow" account, which mortgagor did pay for the April 1968 installment. Where Respondents published the foreclosure figure of $12,519.37 on May 23, 1968, which included an estimated $401.03 for the escrow account, there is no private consensual agreement in the power of sale for the mortgagee to foreclose on anything other than the "indebtedness," which in this case was $12,041.91 less any surplus credit balance in escrow. The $401.03 was not an "indebtedness" since there were no taxes and no insurance due, and none were unpaid. Petitioner did not waive the right to a due process hearing before foreclosure by advertisement on excessive escrow, where the next tax payment due in July 1968 was only $101.33 which Petitioner paid herself after the foreclosure proceedings dated May 23, 1968. The power of sale does not include any terms of waiver as to excessive estimates for the "escrow" moneys, and where nothing was due. Northrip v Federal National Mortgage Ass'n, 372 F Supp 594 (ED Mich. 1974)

For the Court's information, the following listed cases involving "escrow" funds or "escrowing" disputed by mortgagors are are herein submitted only to show the Court some of the activity in this area:

(alleging violation of federal regulations)
Gibson v First Federal Savings and Loan Ass'n.,
347 F Supp 560, 364 F Supp 614 (1973)
504 F 2d 826 (1974.
Milberg v Lawrence Cedarhurst Federal Savings and Loan, 496 F 2d 525 (1974) (excessive escrow)
Miller v Standard Federal Savings and Loan,
347 F Supp 185, 187 (1972) (excessive escrow)

(Alleging conspiracy not to pay interest on escrow funds - Truth in Lending)
Wolfson et al v Artisans Savings Bank et al (1977)
428 F Supp 1315
Note: In Wolfson, that court ruled that the Federal Home Loan Bank Board does not require insurance escrowing.

(alleging trust, with earnings due)
Sears v First Federal Savings and Loan Assn of Chicago, (1971) 1 Ill App 621, 275 NE 2d 300,
50 ALR 3d 683
Buchanan et al v Brentwood Federal Savings and Loan
(10 cases) (Pa. 1974) 320 A 2d 117
Richman v Security Savings and Loan Assn. (1973)
57 Wis 2d 358, 204 NW 2d 511

(alleging mismanagement and self-dealing)
City Federal Savings and Loan Assn v Crowley et al
(1975) 393 F Supp 644

(Payment of Interest on Escrow Accounts)
Judicial and Legislative Developments:
23 Syracuse L. Rev. 845 (1973)

Annotation - Rights in Escrow Funds for Taxes
50 ALR 3d 697

(Trust - Bank simple debtor to depositor)
Carpenter et al v Suffolk Franklin Savings Bank
(Mass. 1973) 291 NE 2d 609

(Alleging interest income earned)
Strathmore Corp v Dollar Savings Bank of New York
(1975) 325 NE 2d 527

(Insurance premium escrowed)
Plan Investments, Inc. v Carmon (La. 1968)
215 So 2d 563
Hassel v Sterling Federal Savings ard Loan, et al
(1971) 271 NE 2d 7
First Federal Savings and Loan v Savage (Ky. 1968)
435 SW 2d 67

(alleging Monopolies)
Forrest v Capital Bldg. and Loan Assoc.
(1973) 385 F Supp 831
Kinee et al v Abraham Lincoln Federal Savings and Loan (1973) 365 F Supp 975
Spens et al v Citizens Federal Savings and Loan
(1973) 364 F Supp 1161
Stavrides et al v Mellon National Bank and Trust Co. et al (1973) 353 F Supp 1072
Beck v Athens Building Loan and Savings
(1974) 65 F. R. D. 691

(Mortgage - liability for failure to pay taxes)
Camden Trust Co v Handle et al (1942)
132 NJ Eq 97, 26 A 2d 865, 154 ALR 602

(Foreclosure denied - Question not considered)
Schechtman v Grobbel et al (1969)
226 So 2d 1 (Fla. Ct. App.)

(Precipitous Foreclosure)
Federal National Mortgage Assoc. v Ricks et al
(1975) 83 Misc 2d 814, 372 N.Y.S. 2d 485

(Foreclosure reversed)
Tucker v Pulaski Federal Savings and Loan Assoc.
481 SW 725, 252 Ark 849 (1972)

(alleging conversion)
Evans v Mortgage Investment Co. of El Paso, Texas (Court of Appeals of New Mexico) 87 N.M. 732, 507 P 2d 793 (1973)

* * * * * *

It is a phenomenon. All these lending institutions have the people "bamboozled" together with the attorneys. Where they are fighting over what is be done with the "escrow" moneys, each one of those cases fail to note that federal regulations do not require any escrow on any insured or guaranteed mortgage loan. The reason is clear.

The lending institutions remind your Petitioner of the guy who has been spitting on the sidewalk for 40 years or so and then pretends he doesn't know he is not supposed to spit on the sidewalk!!! 1 VC 1, 1978.

CONCLUSION

For the reasons set forth above, and because of the demands of the law and substantial justice, the Petition for a Writ of Certiorari should be granted, together with an Order to Show Cause to the Michigan Supreme Court Justices why they should not be held in contempt of this Court, that the foreclosure should be declared illegal, that the decision of October 6, 1977, should be reversed and remanded, and that this Court should exercise its supervisory powers over the Michigan courts, and that further proceedings be required in this case as deemed necessary and appropriate to the ends of justice.

Respectfully submitted,
VIRGINIA CRAMER, Petitioner
In Propria Persona
27314 Clairview
Dearborn Heights, Mich.

Dated:
March 24, 1978

WHERE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED

See Appendix on appeal, Volume I, discovery deposition of Roger C. Richards, President of Metropolitan Federal Savings and Loan Association, pages 183a through 224a.

* * * at page 186a

Q. Mr. Richards, directing your attention to late charges on loans, what is your institution's policy in regard to late charges?

A. Late charge may be imposed if the payment is 15 days late.

* * *

Q. (by Mr. Counard, continuing): Mr. Richards, I show you what is a mortgage note, a copy of a mortgage note, entitled "Metropolitan Federal Savings and Loan Association," Plaintiff's Exhibit No. 1.

A. Yes, this appears to be a standard note. * * *

Q. Is the late charge instituted by your organization pursuant to that paragraph?

A. Yes.

Q. * * * Would I be correct in assuming then that you consider late charge as part of your agreement with Mrs. Cramer?

A. According to the terms of the note.

* * *

Q. (By Mr. Counard, continuing): I show you, Mr. Richards, what is Plaintiff's Exhibit No. 2. It is an IBM or punch payment card of Mrs. Cramer, and on there it indicates, I believe, that a late charge will not be assessed before the 30th of the month, is that correct?

A. Well, it doesn't say that. It says after the 30th add late charge.

Q. Would you ordinarily contemplate foreclosure proceedings prior to the 30th of the month?

A. On a 15-day lateness?

Q. Yes.

A. No, if that were the only default.

* * *

Q. (by Mr. Counard, continuing): How many payments was she required to make during the period she had her loan with you, Mr. Richards?

A. * * * She was required to make one payment each month.

Q. One payment a month.

A. Principal, interest, and escrow.

* * *

Q. As to the escrow funds, Mr. Richards, whose money do you consider that is?

A. That is the borrower's funds.

* * *

Q. Do you pay a mortgagor interest on that money prior to expending those funds?

A. No.

* * *

Q. Would the non-payment of taxes by your organization be a breach of Metropolitan's duties to the mortgagor?

A. No.

* * *

Q. Did you voluntarily assume that responsibility of paying the taxes for the mortgagor?

A. It was required in the terms of our Federal regulations that loans made with a loan devalue ratio in excess of 80 per cent that taxes and insurance in escrow may be maintained and the association must pay these out of the funds.

Q. The loan of the character you just described -- I believe you said over 80 per cent is financed, is that right?

A. Yes.

Q. Do all loans that you finance over 80 per cent require that you pay the taxes?

A. Yes.

Q. Is that your policy?

A. That is the Federal Regulation.

* * *

Q. (by Mr. Counard, continuing): And you are saying that your organization is bound by law to pay the taxes due on the mortgagor's property?

A. We are bound by law to maintain an escrow account for the payment of taxes and insurance.

* * *

Q. (by Mr. Counard, continuing): Do you consider Metropolitan Federal Savings and Loan Association as being bound to pay a mortgagor's taxes in a timely manner, in other words, when due?

A. Not bound, but implied. Certainly I don't know of anything in our agreements or contracts that bind us to pay taxes timely. However, if there is a penalty as a result of the late payment that has to be absorbed by the association.

Q. Were penalties so absorbed in Mrs. Cramer's case by your organization?

A. Yes.

* * *

Q. Do you consider your organization being bound by this mortgage agreement?

* * *

A. No, not bound. In a sense I certainly implied responsibility, but I don't read it as being bound, because the inclusion of that paragraph is for the protection of the mortgagor's interest. So, it is to his interest to see that the taxes are paid.

Q. Do you notice in Paragraph 2 it says that you were to pay the taxes when due?

A. Yes.

Q. Did you notice in Paragraph 2 that monies not expended by the mortgagee pursuant to paragraph 2 are to be credited to principal?

A. Yes. It says if said deposit shall exceed the amount.

Q. If taxes are due but not paid by your organization do you credit the escrow monies that you

hold to the principal account of the mortgagor?

A. No.

* * * at page 194a

Q. Assuming, Mr. Richards, that the taxes of a mortgagor are not paid in two successive years when due, would it be the policy of your institution to credit her principal account with monies of hers that you held but had not expended in a 12-month period?
* * *

A. No.

Q. Are you aware that the property of Virginia Cramer was foreclosed upon by your organization?

A. Yes.

* * *

Q. Did you take part in the decision to foreclose on this particular property?

A. I was aware of it.

* * *

Q. Are you always aware when property is to be foreclosed upon?

A. No.

Q. But in this particular case you were aware of the impending foreclosure?

A. Yes.

Q. What was peculiar about this case that brought it to your attention?

A. I think Mrs. Cramer's visit to my office was one of the peculiar things.

* * *

Q. Do you consider escrow money as a debt owing from the mortgagor to your organization?

A. I don't know. It is hard for me to answer.

Q. I will rephrase the question. Maybe I can make it a little easier. If a mortgagor would not pay the escrow amounts estimated by you would you consider that mortgagor as being indebted to your organization for the

amount of money not so paid? * * *

A. If, in fact, there is no deficit in the escrow account we would not consider it a debt as such on the part of the mortgage agreement.

Q. If, during a 12-month period when you estimate escrow funds, it becomes apparent that there will be more owed than the mortgagor has paid into the organization, would you consider that a debt owing by the mortgagor to your organization prior to your expending funds?

A. Not prior to expending funds. After expending funds.

Q. In other words, I take it that if you did not expend funds the mortgagor would not be indebted to you, in reference to the last question?

A. Yes.

Q. Mr. Richards, are you aware that if taxes are not paid for property for a three-year period it may be sold to satisfy the tax obligation on that property?

A. Yes.

* * * at 197a * * *

Q. (by Mr. Counard, continuing): Did you ever become aware in regard to Mrs. Cramer's property that the property taxes had not been paid by your organization when due on various occasions?

A. I did become aware of this.

Q. When did you first become aware of that?

A. Some time prior to the foreclosure.

* * *

Q. Is Mr. McClintock the Chairman of the Board of Metropolitan Savings and Loan?

A. Yes.

Q. Did you ever have a discussion with him in his capacity as Chairman of the Board regarding the non-payment of Virginia Cramer's taxes when due?

A. No.

Q. Never discussed this matter with him at all?
A. Not as Board Chairman.
Q. In what capacity?
A. Legal counsel.
* * * at page 201a * * *
Q. When this matter came to your attention did you feel that foreclosure was justified?
* * *
A. Yes.
Q. Were you aware that Mrs. Cramer was disputing your escrow requirements?
A. Yes.
Q. And yet you considered the foreclosure as justifiable under those circumstances?
A. Yes.
* * * at page 205a * * *
Q. Was it your understanding of the policy at that time that foreclosures would be made in the 15-day late charge period?
A. Again, I have to say that I don't know that foreclosures are made within the 15-day late charge period.
Q. What I am asking, was it your understanding that a foreclosure would be instituted during that period?
A. No.
* * * at page 205a * * *
Q. Did Mrs. Cramer ask you of your institution, to your knowledge, to pay her own taxes and insurance?
A. I don't recall whether she asked me or not. I am not positive of that point. I know that she has--I understand that she has asked members of the organization to pay her own taxes.
Q. Did your organization allow her to do that?
A. They explained that this could not be done because of regulations.
Q. Was that the sole reason?
A. That is the major reason. It isn't the sole reason. We attempt to have some consistency

in our procedures and it would be quite difficult to have some mortgagors paying their taxes and others not.
Q. Do you have other mortgagors that pay their own taxes?
A. Yes, very few.
Q. In view of Mrs. Cramer's payment record, good principal record, did you consider her at that time a risk as to the payment of her own taxes and insurance?
A. I didn't examine -- I didn't examine the principal balance and relate it to current value of the house. So, I sort of generally felt that if she did pay taxes there were an additional risk we were taking.
Q. At the time foreclosure proceedings were instituted did you consider Mrs. Cramer in default in her mortgage with you?
A. Yes.
Q. How many times did Mrs. Cramer call you on the phone, if she did?
A. I don't know, two or three.
Q. Were you aware that she had called any other personnel of the Metropolitan Federal Savings and Loan?
A. Yes.
Q. Who was that?
A. Well, she called the Chairman, Jim McClintock. Well, she called John Denyer.
Q. How many times did she call Mr. McClintock, do you know?
A. I don't know. Numerous times, I understand.
Q. How many times did she call John Denyer?
A. I don't know.
* * *
Q. Did this upset you?
A. No.
* * *
Q. Did Mrs. Cramer, in your estimation, take up more of your time than most mortgagors?
A. No. Other than the personal visit she asked for.

* * *

Q. In reference to the late charge assessed by your institution after a 15-day period elapses, when a mortgagor has not made a payment, to your knowledge in that 15-day period have there been any other foreclosures by your institution?

A. Not to my knowledge.

* * *

Q. If it is unusual to foreclose in the 15-day late charge period, would you expect that a foreclosure in this period would ordinarily be brought to your attention?

A. Yes.

* * *

Q. When Mrs. Cramer's pending foreclosure was brought to your attention what was the basis for your deciding to allow the foreclosure to proceed?

A. Default in the terms of the mortgage, violation of the regulations.

Q. Default in the terms of the mortgage in what sense, Mr. Richards?

A. Nonpayment of escrow monies for taxes and insurance.

Q. And violation of the regulations in what sense?

A. Regulations that require that that loan have an escrow account sufficient to cover the payment of taxes and insurance when due.

* * *

Q. Is it highly unusual that it would occur during that 15-day period?

A. Yes.

* * *

Q. In the interpretation here then you would say if they paid within the 15-day period they wouldn't have to pay late charges or have any jeopardy of their credit?

A. Generally that is true.

Q. Have you stated anything in there that they might possibly have their mortgage foreclosed

upon if they didn't pay within the 15-day period?

A. No.

* * *

Q. Do you feel that the customer is bound by these payment cards?

A. No, I think he is bound by the mortgage and note.

* * *

Q. If I told you that MGIC premium was due at that time and there was sufficient money to pay it at that time would you assume that it would have been paid?

A. Not necessarily.

Q. Why is that?

A. MGIC insurance is for the protection of the lender. When we paid it would probably not be material. We may even make a judgment not to pay it.

* * *

Q. Directing your attention to Paragraph 66 of our complaint. I would like you to read that. please. It is a mortgage foreclosure published in the Detroit Legal News. Your answer to our Paragraph 66 admits the writing alleged in our --as set forth in our Paragraph 66. My question is, Mr. Richards, the figures set forth in there $12,519.37, how did you arrive at this, or how did your organization arrive at this foreclosure figure?

A. I don't know. * * *

Q. Well, the payment record indicates, Mr. Richards, the one you have supplied us with, that there was $12,041.91 due. So, my question is, if that is correct-- * * * Balance owing on principal of $12,041.91. * * * But, in view of that, on the mortgage payment record, I am asking, do you have records to substantiate the figure of $12,519.37?

A. No.

* * * at page 219a * * *

Q. And do you request from the various taxing authorities that tax bills be sent to your institution?

A. Yes.

Q. Is it a violation of the law you previously cited for the institution not to pay taxes when due?

A. Not to my knowledge.

Q. To your knowledge is there any law that you are aware of that makes it incumbent on your institution to pay taxes when due?

A. No.

* * *

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, Appendix on Appeal, Volume I, at 241a

" * * * a mortgagee does not execute the mortgage. Only the mortgagor executes the mortgage. The mortgagee does not covenant or promise anything under the mortgage document."

* * *

PROCEEDINGS, ORAL ARGUMENT OF COUNSEL, February 4, 1972, Appendix on appeal, Volume I, at 249a thru 298a,

" * * * (254a) (by Mr. Counard): They must give some other consideration. And we say that the consideration that they gave, was that they would perform under that paragraph in that they would pay her taxes, etcetera, when due.

Now in their reply to our brief, they said that they did not sign that agreement, and that they are bound to do nothing. Well, your Honor, Mrs. Cramer obviously did not give them money--

Mr. Thorpe: Which agreement are you referring to?

Mr. Counard: The mortgage.

The Court: They didn't sign the mortgage?

Mr. Counard: They said, "We did not sign the mortgage. Therefore, we are bound to do nothing." And I am saying that she did not give them the money for them to do nothing, obviously.

Obviously, the parties contemplated what was said in paragraph two would be done. That mortgage is called a mortgage agreement. And it is part of the total agreement between the parties. * * *

But what the Defendants are saying to a mortgagor is this:

"We don't have to abide by this agreement. We don't have to pay your taxes when due. We don't have to pay your insurance when due. If you can't show us, somehow, that you were financially damaged, that you had to pay money, or somehow you have been injured, that your property had been sold, or somehow, or something, well, then, you have not been injured. But we can foreclose under the power of sale and sell your property, just because you're not paying yourself, in essence, enough money, even though we have expended no money -- there is nothing due." * * *

But what I am trying to say is that it is her money. The taxes and insurance are her liability. They are not the bank's liability. They are her liability, as a property owner. * * *

The Court: Counsel, you made a statement that the document is not a contract.

Mr. Thorpe: As such.

The Court: As such. But that there are several documents, which will constitute a contract.

Mr. Thorpe: Yes.

The Court: What other documents were you referring to?

Mr. Thorpe: I would refer to the commitment letter, the closing statement, the mortgage note. There are also some added affidavits by Mrs. Cramer, concerning loan value -- signed by Mrs. Cramer--

loan value to value of property. There are some receipts, documents presented at closing and signed at closing, which would constitute a contract.

I might add one other thing, when I talk about the closing, the Defendant, Metropolitan Savings is a savings and loan association, governed by the -- is a federal savings and loan association, governed by the regulations issued by the Home Loan Bank Act--pursuant to the Home Loan Bank Act of 1933. And this states that regulation 545.6-1, that any loan which has a value of 80% --in other words, the loan, 80% of the value of the property--an association must require an escrow clause in the mortgage.

Mrs. Cramer's mortgage was approximately 87% at the time of issuance. We were required to have this in the mortgage document. * * * at 277a * * *

Mr. Counard: All right, Mr. Thorpe brought up a point on FHA mortgages. I just wanted to read to the court from the FHA bulletin * * * He said something to the effect that even FHA, or, something, that requires escrow. What I'm reading from is the Mortgagee's Guide in Administration of Insured Mortgages, April, 1970, I'm reading from an FHA G-4015.9. It has to do with shortages regarding escrow. And it says: (Quoting in part)

> "It will not be considered prudent servicing if the mortgagee declares the mortgage in default, and foreclose, when the only fault was a single failure on the part of the mortgagor to make up a substantial escrow shortage on short notice, since the principal reason for the shortage in these cases is the mortgagee's own failure to make an adequate amount of escrow requirement."

Now, they continued accepting payments from Mrs. Cramer, So we're gonna claim a breach before.

When they keep accepting payments, that might be considered a waiver. And before they foreclosed, they should of made a definite demand for a sum certain, for the amount that they said was deficient.

Then we have the issue--she did pay, in fact, escrow amounts in advance, according to estimates. And she at one point made a claimed deficiency. She paid them two hundred and forty some dollars when they asked for it. * * * statutory forecloures are a matter of contract, it seems to me a contradiction of terms. It is not a matter of contract when we have a statute that you--that says you can't do something. Then you can't contract against that statute. That would be illegal. * * * at 278a * * * at 279a * * *

And they are saying here, that they don't have to pay these taxes for two years, 63 and 64, until 65, which they admitted. That is not a breach of their agreement. They can do that. But if she is late in paying their estimate to the escrow, they can foreclosose. And that seems to me to be just not on the face of it.

The last thing I want to say is--the regulation he cited, what has to do with requiring escrow. Federal Savings Loans were set up under Title 12, Section 1464, for the United States Code. It gives the Home Loan Bank the power to set up regulations. But the regulation he cites, saying that they have to require escrow, a close reading from that regulation will say, only for uninsured loans.

When you have an insured loan--and Mr. Thorpe is shaking his head. He has furnished me with a copy of what it says. It says on * * * uninsured loans. So on this case they didn't have to require an escrow. * * *

The Court: He said that loans are--the value of 80% or more that are insured--but what you might say just comes to make common sense. That if

this is an insured loan--somebody else may require--the insurer may require, because he is in jeopardy, don't you see.

So I'm just saying, you may be right in what you read, but I think there may be other regulations, because the insurer in such a loan that is over 80% will say there's a regulation somewhere, otherwise, he couldn't find an insurer. Don't you see?

* * * at 280a-281a * * *

Mr. Counard: * * * even if they are required to, it doesn't mean they have a right to foreclose because she doesn't pay exactly what they think that she should be paying in advance.

What could she do in this situation? Mr. Thorpe said she didn't have to unilaterally declare that the thing was no good, let's say, and go out and just pay principal and interest. Well, she did what she could. She tried to minimize the whole difficulty here by going back to them and saying,

"Your accounting appears to be shot full of holes, etcetera, I want to pay my own taxes, and I want to pay my own insurance."

That's what she did to begin with, and they refused. And at that point, I don't think they contend that the loan was over 80%. Because she had paid down, you know, a hundred and thirty some payments. So there was no question at that point that they would require escrow payments.

The Court: I see. Well, in this, you see, I think, possible--and in fairness, I might just comment, here. That if somebody is allowed to pay this independently--he has indicated that regulations require the escrow, for loans of 80% or more, I just mention this, because I anticipate that he will reply this. But I don't know, I'm just--

Mr. Counard: Well, my answer to that is, only if it is required at all, to uninsured loans. And her's was an insured loan. But I don't

think he'll argue with that. * * * at 282a.

Well, I wanted to comment on paragraph eight, but I think we discussed this pretty well. It says they can use sherriff's sale for default in payment of said indebtedness. We don't disagree with that, because that would be a condition--or any part thereof, or the performance of a covenant. And I think the covenant is involved in the statute. * * *

The Court: What you are saying, for instance, of course, is that it is not found in the statutes. It is your contention that case law does not support the foreclosure for a covenant.

Mr. Counard: That is correct, your Honor.

In the State of Michigan, when I commented that the law was one way or the other in the State of Michigan. What I'm saying, in the State of Michigan, is that there isn't really any real case law construing--I'm just looking at what the statute says, the words it uses.

* * * at 287a * * *

The Court: * * * The court at this point is petitioned by the Plaintiff and ex-mortgagor to grant a Summary Judgment to Plaintiff, which among other things calls for a decision of law on one basic issue.

To wit: Is a provision for escrow payments in a mortgage--contract of the mortgage, a true condition of the mortgage that allows a mortgagee the right to foreclosose for breach of same? * * *

Now, the key words is, "in any condition", and there is little or no case law on the matter, for apparently the concept of escrow accounts has only been common practice since World War 2. * * * After the foreclosure, both Plaintiff and the Defendant have had to expend enormous sums in legal fees alone, judging from the volume of pleadings, and the fact that this case already has been to the Appeal Court, for other reasons, and then back

to Circuit Court. * * * It is a fact of life that the economy of our nation being what it is, and with the help of the Federal Government, particularly by means of VA and FHA, millions of families are financed and housed on the basis of low, or no down payment mortgage loans.

Lending institutions such as this Defendant can only loan such mortgage monies with FHA and VA insurance guarantees, and the guaranty concept has been taken up to some degree by private organizations such as MGIC, as in this case.

Now, for this higher risk, which of course, is a risk against mortgagor failure, added precautions are basically and necessarily demanded. A basic precaution would be guaranteed payment of taxes, assessments and insurance by the mortgagor-owner on the payment date.

Testimony given reflects that the Escrow Fund for such purposes is a Federal regulation for licensed loan institutions as well as a regulation for the loan guaranty facilities such as FHA, VA and other private loan guaranty sources.

So we must ask: Would it be possible for Plaintiff, or anyone else, to procure such a mortgage loan without such an escrow provision. The answer is "no", since loan institutions and loan guaranty facilities require it as a condition, and therefore, * * * To wit: Pre-payment of taxes and insurance on a reasonable plan. It is a condition, therefore under the statute. * * *

* * * * * * *

* * * at page 293a * * *

The Court: * * * Now, this is what I have for the argument by plaintiff at the time of the foreclosure. "Nothing was due and unpaid at the time of foreclosure. There was a surplus of the escrow account".

* * * page 303a * * *

Affidavit of Virginia Cramer.

" * * * Regardless of whether there might be an unadvanced-deficiency in a mortgage escrow account, meaning that the mortgagee-lending-institution had not advanced any of their moneys for payment of mortgagor-home-buyer's taxes and insurance; and that, in fact, there was a surplus balance in the plaintiff's escrow account at the time of the foreclosure, but that, in fact, defendants had misapplied escrow moneys by failing to pay taxes during a twelve-month period and defendants were late in paying other items during the term of the mortgage; WHERE IS THE PLAINTIFF'S REMEDY???????????????

"10. Before the foreclosure, the mortgagee-lending-institution refused to allow the mortgagor-home-buyer to pay her own taxes and insurance when she requested to do so, in view of the mortgagee-lending-institution's flagrant abuse and misuse of the mortgagor's escrow money. This remedy of paying her own taxes, etc. would have been ideal, at no expense or harm to the lending-institution and no expense or harm to the home-buyer; however, the defendant-mortgagee-lending-institution CHOSE THEIR OWN REMEDY (?????) BY FORECLOSURE BY ADVERTISEMENT WITHOUT NOTICE. Now -- Where is the Plaintiff's remedy?????

"11. Defendants claim they made no promise to pay taxes and insurance with plaintiff's escrow moneys, yet defendants foreclososed on plaintiff's property alleging "deficiencies in escrow" for the payment of taxes and insurance and which said taxes and insurance were not yet due; and the court has failed to allow plaintiff's testimony, proofs, evidence and exhibits to be properly presented to the court. * * * "

APPENDIX "A"

COMPLAINT AND MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

(State of Michigan--Circuit Court--County of Wayne--Filed August 12, 1968)

COMPLAINT FOR CONVERSION OF TAXES IN ESCROW;
COMPLAINT FOR NEGLIGENCE TO PAY TAXES WHEN DUE;
COMPLAINT FOR DEFAMATION PUBLISHED;
COMPLAINT TO QUASH FORECLOSURE; and
COMPLAINT FOR SPECIAL & EXEMPLARY DAMAGES;
MOTION FOR TEMPORARY AND PRELIMINARY INJUNCTION AND RESTRAINING ORDER.

Plaintiff says, in pro per:

1. That plaintiff, Virginia Cramer, is and has been a resident of Wayne County all of her life and that she resides at 27314 Clairview Drive, Dearborn Heights, Wayne County, Michigan, and has resided at said address for the past five (5) years.

2. That defendants, Metropolitan Federal Savings and Loan Association, a United States corporation, is a corporation doing business, together with its officers and representatives alo named herein as defendants, in the County of Wayne, Michigan.

3. That the defendants herein, by publication in the Legal News, have caused such publication noticing a mortgage sale, by public auction, scheduled on August 20, 1968, Tuesday, at Twelve o'clock noon, Local Time, of the premises to which the plaintiff herein is the title-holder of property described as:

East 33 feet of Lot 5 and West 24 feet of Lot 6, of Gordon-Saperstein Subdivision No. 1 of Part of the SW 1/4 of Sec. 6, T2SR10E, Dearborn Township WCM as recorded in L80 P2 Wayne County Records.

said property being the residence of the plaintiff and located at 27314 Clairview Drive, Dearborn Heights, Wayne County, Michigan.

4. That the aforementioned publication has appeared for eleven (11) weeks or more.

5. That the defendants have refused payments from the plaintiff, and are pursuing foreclosure of the property herein described.

6. That the defendants have slandered and defamed the plaintiff publicly throughout the County of Wayne, Michigan, and that said publication fails to purport the true facts by which the defendants have been negligent, abusive, incompetent, defaultive, defalcative and extortive in their position as mortgagees to the plaintiff herein as mortgagor and title-holder of said premises.

7. That by reason of misrepresentations by said publication caused by the defendants, plaintiff has been damaged and demands special and exemplary damages in the amount of $12,519.37.

8. That the defendants, by their mishandling of escrow funds timely paid by the plaintiff, have breached the agreement between the plaintiff-mortgagor and the defendant-ccrporation-mortgagee and plaintiff demands judgment of release from the terms of the mortgage agreement.

9. That the defendants have wrongfully, wilfully and negligently jeopardized the security of the plaintiff.

10. That the plaintiff has a valid defense against the pending foreclosure action of the defendants.

11. That the defendants, each of them, and their agents, employees and attorneys, be restrained from pursuing said foreclosure and by virtue of its jurisdiction this court has jurisdiction over this cause.

12. The plaintiff does not have an adequate remedy at law and in the absence of police authorities the plaintiff will suffer an irreparable damage unless granted relief in a court of equity.

Wherefore, plaintiff being without remedy in the premises except in a court of equity, prays:

(1) That the defendants may be required to answer this bill of complaint fully and completely.

(2) That upon the final hearing of this cause this court will award to the plaintiff such sum or sums of money as this court shall find to be reasonable and proper as damages sustained by the said plaintiff by reason of the abusive and negligent acts of said defendants as set forth in this bill of complaint for which plaintiff may have execution as in a judgment at law.

(3) That the plaintiff demands an injunction to restrain defendant corporation, its servants, agents, employees, officers and attorneys from pursuing foreclosure action and/or mortgage sale of plaintiff's property.

August 10, 1968

Virginia Cramer
Plaintiff in pro per

MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

(State of Michigan--Circuit Court--County of Wayne--Filed August 12, 1968)

Now comes the plaintiff, and moves the court:

1. For a preliminary order of injunction in the above entitled action, restraining and enjoining the defendant corporation, its agents, servants, employees, officers and attorneys, and restraining and enjoining the defendants named herein together with the defendant corporation, during the pendency of this action, from pursuing mortgage sale and/or foreclosure action on property described as:

East 33 feetof Lot 5 and West 24 feet of Lot 6, of Gordon-Saperstein Subdivision No. 1 of Part of the SW 1/4 of Sec. 6, T2SR10E, Dearborn Township WCM as recorded in L80 P2 Wayne County Records.

also known as 27314 Clairview Drive, Dearborn Heights, Wayne County Michigan.

2. For an order temporarily restraining and enjoining all such action on the part of the defendant corporation together with defendants herein, their agents, servants, employees, officers and attorneys, pending the hearing on this motion.

Virginia Cramer
Plaintiff In Pro Per
27314 Clairview Drive
Dearborn Heights, Mich.

August 10, 1968

ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE, WITH TEMPORARY RESTRAINING ORDER

(State of Michigan--Circuit Court--County of Wayne--Filed August 12, 1968)

The complaint of the plaintiff in the above entitled action, praying a preliminary injunction therein, together with a temporary restraining order until such time as it may be determined whether said preliminary order of injuction should issue, having been considered by the court, and the court being fully informed in the premises,

IT IS ORDERED that the defendants show cause before this court on Friday, August 16, 1968, at 11:00 o'clock why a preliminary order of injunction should not be issued as prayed in said complaint.

IT IS FURTHER ORDERED that a certified copy of said complaint and of this order be served on defendants at least four (4) days before the time fixed for showing cause, and that proof of such service be made.

IT IS FURTHER ORDERED that in the meanwhile and until the further order of this court, the said defendants, his agents, employees and attorneys, be and they hereby are restrained and enjoined from pursuing a mortgage sale and/or foreclosure action on property described as:

East 33 feet of Lot 5 and West 24 feet of Lot 6, of Gordon-Saperstein Subdivision No. 1 of Part of the SW 1/4 of Sec. 6, T2SR10E, Dearborn Township WCM as recorded in L80 P2 Wayne County Records.

and also known as 27314 Clairview Drive, Dearborn Heights, Wayne County, Michigan.

Thomas J. Murphy
Circuit Court Judge

MOTION FOR PRELIMINARY ORDER OF INJUNCTION AND TEMPORARY RESTRAINING ORDER

(State of Michigan--Circuit Court--County of Wayne--Filed August 16, 1968)

Now comes the plaintiff, Virginia Cramer, in pro per, and moves the court:

1. For a preliminary order of injunction in the above entitled action, restraining and enjoining the defendants, Metropolitan Federal Savings and Loan Association, a United States corporation, together with James I. McClintock, Roger C. Richards, John C. Denyer, John Doe, Members of the Board of Directors, and Richard Roe, All Other Officers of Metropolitan Federal Savings and Loan Association, its and their agents, servants, employees, assigns and attorneys, during the pendency of this action, from pursuing and/or engaging in a mortgage sale and/or foreclosure action on property described as:

East 33 feet of Lot 5 and West 24 feet of Lot 6, of Gordon-Saperstein Subdivision No. 1 of Part of the SW 1/4 of Sec. 6, T2SR10E, Dearborn Township WCM as recorded in L80 P2 Wayne County Records,

and also known as 27314 Clairview Drive, Dearborn Heights, Wayne County, Michigan.

2. For an order temporarily restraining and enjoining all such action on the part of the defendants, its and their agents, servants, employees, assigns, and attorneys, pending the hearing on this motion.

Virginia Cramer
August 15, 1968 Plaintiff in pro per

SUPPORTING AFFIDAVIT FOR PRELIMINARY ORDER OF INJUNCTION AND TEMPORARY RESTRAINING ORDER

State of Michigan
County of Wayne---ss

Virginia Cramer, plaintiff in pro per, being first duly sworn, deposes and says:

1. That she is the plaintiff in the above entitled action;

2. That she makes this affidavit in support of her motion for a preliminary order of injunction in said action, to which said motion this affidavit is attached;

3. That she is the title-holder of property located at 27314 Clairview Drive, Dearborn Heights, Wayne County, Michigan, said property being the residence of the plaintiff herein, and described as:

East 33 feet of Lot 5 and West 24 feet of Lot 6, of Gordon-Saperstein Subdivision No. 1 of Part of the SW 1/4 of Sec. 6, T2SR10E, Dearborn Township WCM as recorded in L80 P2 Wayne County Records.

4. That the defendant-corporation in the above entitled action is the Mortgagee of said property with power of sale contained in the mortgage agreement between the parties herein.

5. That by publication in the Detroit Legal News the defendants have noticed a Mortgage Sale of the said above-described property to take place, by public auction, on Tuesday, August 20, 1968, at Twelve o'clock noon, Local Time, and that said publication has appeared each week consecutively for twelve weeks or more.

6. That such Notice of Mortgage Sale, dated May 23, 1968, and scheduled for public auction on August 20, 1968, is a perpetration of fraud by the defendants upon the plaintiff; and that the defendants are attempting to conceal their willful acts of negligence to pay taxes when due on plaintiff's property for which plaintiff had made timely escrow payments for said taxes as stipulated by monthly payments, between the parties herein.

7. That the defendants, by their own willful negligence, abusiveness and deliberateness, by intent and design in mishandling and misusing said escrow monies, have breached the mortgage agreement between the parties herein and that, therefore, said defendants have rescinded said mortgage agreement by having substantially defaulted and failed to perform in accordance with the terms of the mortgage agreement; and that thereby having violated certain terms of the mortgage agreement, said agreement between the parties herein is ended and defendants, therefore, are without power of sale by having heretofore breached said mortgage agreement.

8. That the public records of the Wayne County Treasurer and the Dearborn Heights City Treasurer show conclusively that the defendants herein substantially defaulted in payment of taxes in violation of said mortgage agreement between the parties herein.

9. That the defendants had accepted the timely April 1968 payment from the plaintiff; that the defendants noticed the mortgage sale by publication dated May 23, 1968, which date being subsequent to the date and time plaintiff had already confronted the defendants with such facts that the defendants had breached said mortgage agreement; that the defendants allege they had refused to accept the timely May 1968 payment on the mortgage note as offered by the plaintiff, but which said May 1968 payment has never been returned to the plaintiff; and that the defendants had refused subsequent payments offered by the plaintiff for the months of June 1968 and July 1968.

10. That the plaintiff has timely paid all of the taxes that were due on said property subsequent to the Notice of Mortgage Sale date of May 23, 1968, directly to the persons authorized to accept such payments inasmuch as the defendants herein have recurrently and repeatedly shown willful negligence to perform in accordance with the terms of the mortgage agreement as to payment of taxes with escrow monies.

11. That the defendants refused to execute a Release so that plaintiff may exercise her absolute right to pay such taxes as they become due upon the rescission for default by the defendants under the mortgage agreement; that instead of executing a Release, defendants maliciously commenced foreclosure action against the plaintiff.

12. That the Wayne County Prosecutor's office, upon the complaint of the plaintiff, had proved incapable to perform in this matter, and that in the absence of the police authorities the plaintiff will suffer an irreparable damage unless granted relief in a court of equity.

13. That immediate and irreparable loss, damage, and injury has resulted by the willful negligence and malicious perpetrations and abusiveness by the defendants, and further irreparable loss, damage and injury will result to the plaintiff unless the mortgage sale and/or foreclosure actions as contemplated to take place on August 20, 1968, as maliciously intended and perpetrated on the part of the defendants are forthwith enjoined, pending the hearing of this motion and thereafter during the pendency of this action.

14. That an adjournment of plaintiff's Order to Show Cause Why A Preliminary Injunction should not be issued, as requested by the defendants, will cause such mortgage sale to take place on August 20, 1968, as maliciously contemplated and intended by the defendants.

15. That the defendant's attorney, or one of them, failed to fulfill his promise, by letterform as to a conclusive statement that such mortgage sale would not take place, pending this action, and no such letter, as promised, has been received by the plaintiff.

Further deponent sayeth not.

Virginia Cramer
Plaintiff in pro per

August 15, 1968
(JURAT)

APPENDIX "B"

FIRST AMENDED COMPLAINT
and
MOTION FOR PRELIMINARY INJUNCTION

(State of Michigan--Circuit Court--
County of Wayne--Filed August 23, 1968)

FIRST AMENDED COMPLAINT
AMENDED COMPLAINT FOR CONVERSION OF TAXES IN ESCROW;
AMENDED COMPLAINT FOR NEGLIGENCE TO PAY TAXES WHEN DUE;
AMENDED COMPLAINT FOR DEFAMATION PUBLISHED;
AMENDED COMPLAINT TO QUASH FORECLOSURE; and
COMPLAINT FOR BREACH OF AGREEMENT;
AMENDED COMPLAINT FOR SPECIAL AND EXEMPLARY DAMAGES;
MOTION FOR PRELIMINARY INJUNCTION AND RESTRAINING ORDER.

Plaintiff says, in pro per,

1. That plaintiff, Virginia Cramer, is a life-long resident of Wayne County and that she has resided at 27314 Clairview Drive, Dearborn Heights, Wayne County, Michigan for the past five (5) years.

2. That the defendants, Metropolitan Federal Savings and Loan Association, a United States corporation, is a corporation doing business, together with its officers and representatives, also named herein as defendants, at their principal place of business located at 19830 West Seven Mile, Detroit, Wayne County, Michigan.

3. That the defendants, by publication in the Detroit Legal News, have caused a recurrent weekly publication, for twelve (12) weeks or more, noticing a mortgage sale, by public auction, scheduled

on August 20, 1968, Tuesday, at Twelve o'clock noon, Local Time, of the premises to which the plaintiff herein is the titleholder of property described as:

> East 33 feet of Lot 5 and West 24 feet of Lot 6, of Gordon-Saperstein Subdivision No. 1 of Part of the SW 1/4 of Sec. 6, T2SR10E, Dearborn Township WCM as recorded in L80 P2 Wayne County Records.

said property being the residence of the plaintiff, and located at 27314 Clairview Drive, Dearborn Heights, Wayne County, Michigan.

4. That the said defendant corporation, Metropolitan Federal Savings and Loan Association, is the holder of a mortgage note and mortgage agreement on said above-described property.

5. That the defendants have refused payments from the plaintiff and are pursuing foreclosure of the property, with power of sale contained in mortgage agreement, as shown in the annexed copy of mortgage agreement attached hereto as Exhibit 1.

6. That by mortgage agreement, plaintiff Virginia Cramer has diligently performed in meeting the terms of the mortgage agreement between the said Virginia Cramer, Mortgagor, and the Metropolitan Federal Savings and Loan Association, Mortgagee.

7. That, even though the defendants Metropolitan Federal Savings and Loan Association had received escrow monies timely paid by Virginia Cramer, said defendant-corporation

defaulted and allowed the taxes due on said property at 27314 Clairview, Dearborn Heights, Michigan, to become delinquent on various occasions.

8. That the defendants have deliberately, intentionally and wrongfully used such escrow monies contrary to the terms of the mortgage agreement and to the defendant-corporation's own advantage while defaulting in payment of taxes; that said escrow funds were to be held without interest thereon and to be used solely for the purpose of paying taxes when due, together with other disbursements for insurance, according to the mortgage agreement.

9. That the public records of the Wayne County Treasurer and the Dearborn Heights Treasurer disclose evidence, pertaining to the above-described property, as follows:

1963-64 Wayne County taxes due December 1, 1963, in default and delinquent approximately one (1) year, with penalty and interest accrued.

1964-65 Dearborn Heights City taxes due July 1, 1964, in default and delinquent approximately seven (7) months, with penalty.

1965-66 Dearborn Heights City taxes due July 1, 1965, in default and delinquent approximately three (3) months, with penalty.

1967-68 Dearborn Heights City taxes due July 1, 1967, in default and delinquent approximately 1-1/2 months, with penalty.

10. That the defendants, by their mishandling of escrow funds timely paid by the plaintiff, have breached the agreement between the plaintiff-mortgagor and the defendant-corporation-mortgagee and plaintiff demands judgment of release from the terms of the mortgage agreement.

11. That the plaintiff, as title-holder of said property, is responsible for the payment of such taxes as they become due and that the defendants herein have willfully and wrongfully established a record of delinquencies and failed and neglected to pay such taxes when due, from escrow monies paid by the plaintiff.

12. That the defendants have never requested your plaintiff payment of deficiencies in escrow, but instead the defendants have demanded excessive escrow monies, over-and-above the amounts that may have been needed to meet disbursements of taxes and insurance, by mathematical trick and subterfuge and under threats of immediate fore osure, said excessive escrow monies demanded by the defendants to be paid in monthly installments.

13. That your plaintiff had requested the defendants, on or about April 26, 1968, to execute a Release in her favor in order to permit your plaintiff to pay such taxes and insurance as they become due directly to those authorities competent to accept same, with plaintiff's own funds, rather than deposit escrow monies with the defendant-corporation, inasmuch as said defendants demand excessive escrow monies, from time to time, have furnished either erroneous statements or no statements, have defaulted in payment of taxes, repeatedly, and misuse and mishandle escrow funds.

14. That defendants, instead of executing a Release as requested by the plaintiff, accepted the timely April 1968 payment from the plaintiff herein, published foreclosure action dated May 23, 1968, and refused to accept subsequent timely payments from your plaintiff in payment on the mortgage note.

15. That the defendants demand an alleged sum of escrow due in the amount of $401.03 as of the date of May 23, 1968, plus subsequent escrow payments to be paid each month which will result in an excess amount of escrow of approximately $200.00 to $300.00 over-and-above the amounts needed to be disbursed for taxes and insurance, of which disbursements for taxes have recurrently been paid in a delinquent state by the defendants, which has jeopardized the security of your plaintiff as title-holder.

16. That your plaintiff was not in default in the conditions of the mortgage agreement or the mortgage note as published by the defendants by foreclosure action dated May 23, 1968; that defendants are assessing your plaintiff with approximately $500.00 for foreclosure costs of attorney fees, publication charges for twelve (12) weeks or more, and increased interest rates.

17. That the timely May 1968 payment made by the plaintiff has never been credited to the plaintiff's account, nor has said May 1968 payment been returned to your plaintiff by the defendants; and defendants have refused to accept payments for June 1968 and July 1968 as timely offered by your plaintiff, on mortgage note.

18. That your plaintiff has paid any and all taxes on said property subsequent to the Notice of Mortgage Sale dated May 23, 1968; said taxes in the amount of $101.33 were paid by your plaintiff in July 1968 when due.

19. That the defendants have slandered and defamed the plaintiff publicly throughout the County of Wayne, Michigan, and that the publication in the Detroit Legal News as caused by the defendants and having been re-published each week consecutively for twelve (12) weeks, or more, fails to purport the true facts by which the defendants, themselves, have been negligent, abusive, incompetent, defaultive, defalcative and extortive in their position as mortgagees and in defamation to the plaintiff herein as mortgagor and title-holder of said premises involved.

20. That by reason of misrepresentations by said publication caused by the defendants, plaintiff has been damaged and demands special and exemplary damages in the amount of $12,519.37.

21. That the defendants have wrongfully, willfully and negligently jeopardized the security of the plaintiff and have publicly subjected your plaintiff to purported defamations of irresponsibility and de-characterization libelously.

22. That said defamation and libelous de-characterization is a detrimental reflection on the credit-standing of your plaintiff.

23. That the plaintiff has a valid defense against the pending foreclosure action of the defendants.

24. That the defendants, each of them, and their agents, employees and attorneys, be restrained from pursuing said foreclosure action and/or mortgage sale, and be restrained from selling, assigning, transferring, conveying and/or otherwise disposing of said mortgage and/or mortgaged property involved herein,

between the parties, to any other third party.

Wherefore, plaintiff being without remedy in the premises except in a court of equity, prays:

(1) That the defendants may be required to answer this First Amended Complaint fully and completely.

(2) That upon the final hearing of this cause this court will award to the plaintiff such sums of money as this court shall find to be reasonable and proper as damages sustained by the said plaintiff by reason of the abusive and negligent acts of said defendants as set forth in this first amended bill of complaint for which plaintiff may have execution as in a judgment at law.

(3) That this court will award judgment of release from the terms of the mortgage to the plaintiff upon the rescission for default by the defendants.

(4) That the preliminary injunction and restraining order be issued, restraining the defendants and defendant-corporation, their agents, employees and attorneys from pursuing foreclosure action and/or mortgage sale, from selling, assigning, transferring, conveying and/or otherwise disposing of said mortgaged property as involved in this cause between the parties herein to any other party or parties.

Virginia Cramer
August 22, 1968 Plaintiff in pro per
Jurat

APPENDIX "C"

PROCEEDINGS OF SEPTEMBER 6, 1968

(State of Michigan--Circuit Court--County of Wayne)

Proceedings had in the above entitled cause before the Honorable Thomas J. Murphy, Circuit Judge, at Room 1611, City-County Building, Detroit, Michigan, on Friday, September 6, 1968.

Appearances: Abel Selburn, Esq.,
Appearing in behalf of plaintiff

Michael Doelle, Esq.,
Appearing in behalf of defendant

The Court: What have you decided on?
Mr. Doelle: I understand Mr. Selburn was at Metropolitan Saturday morning and examined their records. I understand from what Mr. Selburn said to Mr. Denyer at the time he wanted to examine Mr. Denyer on the witness stand. I have brought him down. We have already, I think, by affidavit put forth our case that we claim there is a deficiency in the escrow fund.
The Court: What do you say?
Mr. Selburn: May it please the court, the amount of the escrow fund is set forth very clearly in paragraph 2 of the mortgage and in Section 1 how to arrive at it and in this case they are asking for far, far beyond what they are required to.
The Court: What are the figures?
Mr. Selburn: They have asked at the time of foreclosure for the sum of $401.03.
The Court: Yes.
Mr. Selburn: They are asking for mortgage insurance premiums payable through July 1st. They are asking for city taxes.

The Court: That is $401.03. Is this in addition?
Mr. Selburn: At the time they asked for it they had $32.92 in their kitty in the escrow fund.
Mr. Doelle: And we said there should have been an additional $401.03.
Mr. Selburn: And they said the July 1st MGIC premium of $30.36 had to be paid.
The Court: $30.36. That is for what?
Mr. Selburn: This is for mortgage insurance. That is an FHA type of insurance where the premium is paid by the borrower each year instead of one-half of one percent as they pay under FHA, is that correct?
Mr. Doelle: This is something that was agreed to at the time the mortgage was undertaken.
Mr. Selburn: There is no objection to that. There was a July 1st, 1968 city tax premium due of $82.17.
The Court: $82.17 taxes?
Mr. Selburn: That is right. City tax. Then they computed six months of county tax at $37.57 a month or $225.42.
The Court: Wait a minute. $37.57 a month?
Mr. Selburn: A month and they compute that for six months or $225.42.
The Court: $225.42.
Mr. Selburn: This is in Dearborn Heights.
The Court: What is the county tax?
Mr. Selburn: The county tax they estimated at $450.84.
The Court: Yes. What is the complaint?
Mr. Selburn: They also ordered 24 months of fire and extended coverage insurance in advance at $4.00 a month, or $96.00. The hazard insurance, as they call it, was prepaid until July of 1969, but nevertheless they want two years in advance right then and there.
The Court: For what insurance?

Mr. Selburn: For fire and extended coverage, hazard insurance.
The Court: It is paid until when?
Mr. Selburn: It is paid to July 29, 1969.
The Court: How much?
Mr. Selburn: $96.00. That totals out to $433.95.
The Court: Yes.
Mr. Selburn: And they said there was a balance in the escrow account on April 30th of $32.92, and they therefore demanded $401.03.
The Court: Yes.
Mr. Selburn: Now, in addition to that they said that they will make payments commencing May of $52.10 per month on the escrow agreement.
The Court: For what?
Mr. Selburn: For May through December so that funds can keep building up. I agree with you, for what? Because by the end of the year, with all these funds they have demanded, and the money they collected in January, February and March they will have collected $851.47, with an approximate payout of around $450.00, so they are demanded $400.00 more than the agreement calls for.
Mr. Doelle: I think this is the nub of it because we have been discussing since we came in four weeks ago this very thing. He points out the hazard insurance and says it is prepaid until July, 1969. In July 1969 we are going to have to again prepay another three years of hazard insurance. We need the money in the escrow fund in order to pay that. All of these things have been computed on the basis of what we require in the fund to pay the future obligations. Mr. Denyer says the fund has been accurately computed.
The Court: How much is the insurance?
Mr. Selburn: The insurance, it is paid by them on a three years basis, but it can be paid on a one year basis as 99 percent of their insurance is paid, and there is no reason for

either party to pay three years in advance. They were originally paid three years in advance, and I know I have a conventional mortgage and I pay in 1/12th of the annual premiums and at the end of the year my mortgage company pays the premium on the hazard insurance.

Mr. Doelle: I believe this was Mrs. Cramer's policy which she took out originally and did not pay for and when we got around to pay it, which she did not pay, we paid a three year policy. It was her determination.

Mr. Selburn: The insurance is normally paid on an annual basis.

Mr. Doelle: It is being paid on an annual basis --no, it is a three year policy and she is paying monthly?

Mr. Selburn: But you are accumulating approximately $300.00 so that you would have to at present to pay three years in advance.

Mr. Doelle: No. We will have, if she brings up her deficiency of $401.03, we will have two years. By the end of July, 1969 we will have a third year and prepared to pay another year.

Mr. Selburn: Isn't it true if she paid the $401.03 and you collected $52.00 she will pay in $851.00 this year?

Mr. Doelle: If those are the figures.

Mr. Selburn: The taxes, they would have to be taken out or if, and they would be $450.00, and we would have a $400.00 excess.

The Court: What taxes?

Mr. Selburn: County taxes.

The Court: What about the city taxes.

Mr. Selburn: They were paid.

Mr. Doelle: But the city taxes were not paid at the time that computation was made and they were not paid.

Mr. Selburn: So it would be $300.00.

Mr. Doelle: What about this MGIC insurance premium and the hazard insurance premium?

Mr. Selburn: We are taking all that into consideration.

Mr. Doelle: I am not an expert in that area. I would like to have the benefit of Mr. Denyer's testimony.

The Court: Put him on the stand.

JOHN DENYER, was thereupon called as a witness for and in behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Doelle:

Q. Mr. Denyer, you were the one that made the computation of $401.03 deficiency in the escrow fund?

A. That is right.

Q. How did you arrive at that computation.

The Court: We all agree on that, didn't we?

A. Yes.

Q. Did you hear Mr. Selburn's statement?

A. Yes, I have.

Q. Is he correct?

A. No, he is not.

Q. How is he incorrect?

A. First of all, can I clear that up about the insurance?

Q. Yes.

A. At the time of the closing, your Honor, we asked that the new mortgagor furnish us with a paid insurance policy, one year paid policy. We were requiring this at the time of the closing. At the time of closing we don't collect enough to pay this first year. That happens all the time. Mrs. Cramer was made aware of this, that she must furnish us with a one year prepaid policy. She came without it. Rather than drop the whole closing we took her promises that she would pay this insurance policy that day because she did

not have a paid receipt, and she agreed to this. Then three months later we got a delinquent notice from the insurance company.

Mr. Selburn: I object to this on the basis he was not present at the closing.

Mr. Doelle: It is in an affidavit.

Mr. Selburn: He is testifying to something he was not present at.

The Court: An affidavit does not mean anything.

Mr. Doelle: Mr. Gilroy was in court two or three weeks ago and at that time his testimony was not needed. I will be glad to furnish him.

The Court: Let us forget about that right now. How much does it take for Mrs. Cramer every month to pay her interest and escrow fund for the mortgage interest, taxes? Does it include the mortgage interest?

A. It included taxes, the MGIC insurance, home owners insurance, the city taxes and county taxes.

The Court: How much does it take to pay those every year?

A. Every year we collect, sir, we add the total requirements for the year and we take 1/12th, so we take 1/12th per month.

The Court: How much does it take per year to keep them up to date?

A. It would take $51.80 per month.

The Court: So that is $621.50?

A. Right. Now, judge, at the end of the year we had an escrow analysis and we found again she was short of requirements, and at that time we took the total amount of the shortage and divided by 12, rather than ask the entire balance be paid, we divided that figure by 12.

The Court: What was the shortage?

A. At the end of the year--by the end of the year the shortage was $362.79. We had a red, zero balance of $191.84. She owed us that

much to break even. She paid $191.84, one year taxes and insurance and what we were asking was to be reimbursed, plus to pay for the taxes.

The Court: That $361.79, what is that?

A. $362.79 as of December 30, 1967, We needed $170.95. We had a minus of $191.84, a red balance.

Q. Where did that come from?

A. We disbursed from her escrow account more money than she had there.

Q. What for?

A. County taxes became due December 1st, and we did not have enough money to pay.

The Court: So you say she did owe $362.79 the first of the year?

A. Right.

The Court: For payment of the county tax.

A. For the payment of the county tax. She was short that amount $362.79, so I maintain. She was notified of this in April, that the account was short and we were asking her to make up that shortage and this is how we get this default.

Mr. Doelle: I think what Mr. Selburn fails to take into account is the fact the deficiency goes back prior to the beginning of this year. She may be asked to pay in more this year than will be paid out.

The Court: It is $81.00, what she had to pay to keep even and there is $30.00--

Mr. Selburn: She is willing to pay, but she was not notified until April. Here is an organization that is run by a computer which is supposed to be instantaneous, and four months later they notify her she has to pay back payments.

She was willing. At that time she made four payments or more and if they were credited she had an excess of $32.00. They come in saying if they didn't get more money in at

at the end of the year there would be another shortage, and a reasonable sum my client expected was willing to pay in. They asked in April for $401.03, and--

The Court: I thought we all agreed that was what was owed at that time.

Mr. Selburn: This is what they demanded.

The Court: That is what was owed?

A. Right.

Mr. Selburn: That is what they figured was owed. It was not owed.

The Court: How much was owing?

A. At the time we filed this foreclosure action $401.03 was owing then, and it keeps increasing each month. We should have more in that account.

The Court: His records show she owed $401.03 at that time.

Mr. Selburn: At that time. Now, Mr. Denyer, if my client had paid you the demands you made of $52.00 per month thereafter--

The Court: That would only keep it up to date.

Mr. Selburn: No, it wouldn't, because the addition of $401.03 and the payments that have been made this year, they would have collected $851.47.

The Court: They would have collected $51.80, plus $30.00 or $81.00, approximately, and that times 12, I suppose is--

Mrs. Cramer: Your Honor--

The Court: Never mind. That would amount to $900.81.

A. Right.

Mr. Selburn: That they would have collected.

The Court: That they are entitled to collect according to the figures.

Mr. Selburn: But they are not--

The Court: Why not.

Mr. Selburn: They wouldn't pay out that kind of money according to her own statement.

The Court: She is $400.00 behind before they start.

Mr. Doelle: She was $360.00 at the end of the year.

Mrs. Cramer: I paid January, February, March and April.

Mr. Selburn: They collected two payments of $46.19, another of $50.10 and one of $82.19.

The Court: One of $50.19, two of $46.19 and one of $82.19.

Mr. Doelle: I think what Mr. Selburn is trying to do is come out with a zero balance.

Mr. Selburn: According to your contract you are entitled to an additional amount over and above by 1/12th.

A. No, not by 1/12th. The city tax is due in July so we have to have 6/12ths.

Mr. Selburn: That is not what the contract reads.

A. That is what it reads. We can collect 1/12th of the requirements per month and that is what we do.

The Court: She claims she paid $224.57 that you haven't given her credit for.

A. This is a year end statement. It shows two payments of $40.19, $50.19 and plus $32.00, which makes it $82.19 and she was credited with that and we needed $433.00. She was credited with those payments each month that she made them.

The Court: Where does it show paid out?

A. At the end of the year we had a $191.84 minus balance. At the time we would have had $401.03 to meet requirements.

Mr. Selburn: And on January 1st of this year when she was $191.84 in the red you had asked for that and gotten it?

A. Right.

Mr. Selburn: And she made her $51.80 payment, or if she made it, you say, as required she would be all right?

A. She would continue to be short. This is what we needed at the end of the year. We needed

that and the red of $194.00 and that $170.95, plus 1/12th added onto that, and that would have been enough to make the payments when due.

The Court: What do you mean $191.84?

A. We had a red escrow balance. We should have had one month of county tax for that one month, plus the 11 months would give us enough to pay them. We needed 1/12th of the county tax. At that time we also needed $37.57. Her MGIC insurance premium is due, and we must have 6/12ths or one half of that premium set aside at that time, which was $16.50, six months at $2.76 or $16.50.

The Court: Yes.

A. Her city tax at that time would have been due, July 1st, as of December 30th. We needed six months at $7.47 a month and that was $44.82 and then her insurance is due, and it is $4.00 a month and we have to collect for 18 months, so we needed 18 months at $4.00, or $72.00 and the total is $170.95 is the amount we need.

Q. Plus a red escrow balance.

A. Would give us $362.79.

Q. Which is what you added at the end of the year?

A. Right.

Q. Than if you add that to the $52.00--

A. So now we need this amount. She had a red escrow balance, and she had a zero balance at the end of the year. It would not meet fund requirements. We must have a certain percentage of requirements set aside at that time. 1/12th for each month after it becomes due.

Mr. Selburn: It still doesn't come out to $851. per year.

The Court: It does.

Mr. Selburn: Not if it is $51.80 per month.

The Court: She was behind.

Mr. Selburn: I want to ask one other question. Whose funds are these?

A. Virginia Cramer's.

Mr. Selburn: How can you foreclose a mortgage on her own funds? There is no indebtedness.

The Court: You mean there is no indebtedness when she says she will pay so much per month for the taxes?

Mr. Selburn: And she has.

The Court: She is behind. She was $191.00 behind at the beginning of the year. You take that $191.00 and figure the taxes and all her payments and what she has to pay on all of it and she is behind and it comes to $851.00. * * *

Mr. Selburn: They are still asking for an excess far beyond their necessary requirements.

The Court: I don't think they are.

Mrs. Cramer: I have it all drawn out here. It is on paper right here. Figures don't lie.

Mr. Selburn: And when there is a suit to restrain a foreclosure--

The Court: I don't want to hear any more about it. The injunction may be dismissed and they can proceed to foreclose.

Mr. Doelle: Thank you, your Honor.

* * * * * * * *

APPENDIX "D"

ORDER DISSOLVING TEMPORARY RESTRAINING ORDER

(State of Michigan--Circuit Court--County of Wayne--Filed September 27, 1968)

At a session of said Court held in the Court Room in the City-County Building in the City of Detroit, on the 27th day of September, 1968.

Present: The Honorable Thomas J. Murphy,
Circuit Judge

This matter having come on to be heard on Plaintiff's Motion for Order to Show Cause why a preliminary injunction should not issue, the Court having previously entered a Temporary Restraining Order in this matter, and the Court having examined the pleadings which have been filed, and the Court having heard testimony and examined the Exhibits which have been filed and heard oral argument by the attorneys representing both parties, and the Court having determined that Plaintiff is in default on her Mortgage, and the Court being fully advised in the premises, now therefore,

It is hereby ordered and adjudged that the Temporary Restraining Order previously entered by the Court in this matter restraining the Defendants from proceeding with foreclosure on the following described property:

East 33 feet of Lot 5 and West 24 feet of Lot 6, of Gordon-Seperstein Subdivision No. 1 of Part of the SW 1/4 of Sec. 6, T2SR10E, Dearborn Township WCM as recorded in L80 P2 Wayne County Records

be and the same hereby is dissolved, set aside and held for naught, and the Defendants are hereby permitted to proceed with their foreclosure action on the above described property.

Thomas J. Murphy
Circuit Judge

NOTICE OF HEARING
(State of Michigan--Circuit Court--County of Wayne-- Filed _____)

To: Abel J. Selburn, Attorney for Plaintiff,
Suite 109, 18000 W. Eight Mile Road,
Southfield, Michigan 48075

Please take notice that on Friday, the 27th day of September, 1968 at 11:00 a.m. or as soon thereafter as Counsel may be heard an Order Dissolving the Temporary Restraining Order heretofore entered in this matter will be presented for entry by the Honorable Thomas J. Murphy, Judge of the Circuit Court for the County of Wayne, a copy of which is attached hereto.

McClintock, Fulton, Donovan &
Waterman,
By: Michael B. Doelle
Attorneys for Defendants
2150 Guardian Building
Detroit, Michigan 48226
963-3400

PROOF OF SERVICE

State of Michigan
County of Wayne--ss

On this 23rd day of September, 1968, personally appeared before me Michael B. Doelle, who being first duly sworn deposes and says that he is a member of the firm of McClintock, Fulton, Donovan & Waterman, attorneys for Defendants, in the above cause and that on September 23rd, 1968, he served a copy of the Notice of Hearing and Order Dissolving Temporary Restraining Order, attached hereto, upon Abel J. Selburn, attorney of counsel for Plaintiff, by placing copies of said Notice and Order in envelopes properly addressed to him and depositing said envelopes with postage fully prepaid in the United States Mail Chute in the Guardian Building, Detroit, Michigan.

Michael B. Doelle

(short jurat)

APPENDIX "E"

DISMISSAL OF PLAINTIFF'S ATTORNEY

(State of Michigan--Circuit Court--County of Wayne--Filed March 16, 1970)

Virginia Cramer, plaintiff in pro per, in the above entitled action, having filed grievances against Abel J. Selburn, a Member of the State Bar of Michigan to investigate acts of misconduct of the said Abel J. Selburn, and pending said investigation, the plaintiff herein has dismissed the said Abel J. Selburn, Attorney at law, in this cause.

Virginia Cramer
Plaintiff in pro per
27314 Clairview Drive
Dearborn Heights, Michigan

SECOND AMENDED COMPLAINT TO CONFORM TO ADDITIONAL AND NEW EVIDENCE

(State of Michigan--Circuit Court--County of Wayne--Filed March 16, 1970)

Now comes Virginia Cramer, plaintiff in pro per, and her Second Amended Complaint says:

1. That she is a resident of Dearborn Heights, Wayne County, Michigan.

2. That the Defendant, Metropolitan Federal Savings and Loan Association, is a United States Corporation and its principal place of business is located in the City of Detroit, County of Wayne, State of Michigan.

3. That the Plaintiff is the owner in fee of

premises situated in the City of Dearborn Heights, County of Wayne, State of Michigan, described as follows: The East 33 Feet of Lot 5 and West 24 Feet of Lot 6, of Gordon-Saperstein Subdivision No. 1 of Part of the Southwest Quarter of Section 6, Town 2 South, Range 10 East, Dearborn Township, Wayne County, Michigan, as recorded in Liber 80, Page 2, Wayne County Records.

4. That the Plaintiff was the mortgagor of a mortgage between the plaintiff and the defendant corporation, dated the 29th of July, 1963, wherein the plaintiff agreed to pay the defendant the sum of Sixteen Thousand Five Hundred ($16,500.00) Dollars with interest at the rate of Five and Three-Quarters (5-3/4%) Percent annum and the rate of Seven (7%) Percent per annum during any period of default.

5. That the said interest rate of Five and Three-Quarters (5-3/4%) Percent consisted of Five and one-half (5-1/2%) percent per annum on the mortgage itself and one-quarter (1/4 of 1%) of one percent per annum payable to Mortgage Guaranty Insurance Corporation, 600 Marine Plaza, Milwaukee, Wisconsin.

6. That the said one-quarter of one (1/4 of 1%) per cent per annum has never been paid to Mortgage Guaranty Insurance Corporation and instead the defendants, Metropolitan Federal Savings and Loan Association, have charged your plaintiff the full amount of Five and One-half (5-1/2%) percent plus one-quarter of one (1/4 of 1%) percent per annum as solely interest on the mortgage, contrary to the original offer and acceptance of the mortgage terms.

7. That in addition to the afore-mentioned One-quarter of one (1/4 of 1%) percent per annum, the defendants Metropolitan Federal Savings and

Loan Association, did charge your plaintiff's escrow account with another One-quarter of one (1/4 of 1%) percent of the decending balance of the mortgage amount thereon as of July 1, 1964, July 1, 1965, July 1, 1966, July 1, 1967, and July 1, 1968.

8. That the mortgagee, Metropolitan Federal Savings and Loan Association, defendants herein, also required in addition to the monthly installments of principal and interest, installments of the taxes and assessments levied or to be levied against the premises plus an installment of the premium that would next become due to renew the insurance of the said premises. That the said installments should be equal, respectively to the taxes and assessments next due and the premium for insurance as estimated by the mortgagee, less all sums already paid therefore, divided by the number of months to elapse before one month prior to the date such taxes, assessments and premiums would come due. And the mortgagee agreed to hold such sums and to pay such taxes, assessments and premiums when due.

9. That although the defendants, Metropolitan Federal Savings and Loan Association, had received escrow monies timely paid by the plaintiff nevertheless the defendants defaulted and allowed taxes due on the property to become delinquent on numerous and various occasions.

10. That the defendants deliberately, intentionally and wrongfully used the escrow money contrary to the terms of the mortgage agreement and to the defendant-corporation's own advantage while defaulting in payment in taxes, even though said escrow monies were to be held without interest and to be held solely for the purpose of paying taxes and insurance when due according

to the said mortgage agreement.

11. That the defendants informed your plaintiff on February 20, 1968, in writing, that her escrow account was adequate.

12. That on April 18th, 1968, the defendants informed your plaintiff that they had erred in their computations of her escrow account and made a demand that plaintiff pay several hundred dollars forthwith and in addition thereto, demanded that your plaintiff increaseher escrow contributions substantially each month.

13. That your plaintiff computed the amount of money necessary to comply with the mortgage and mortgage note and informed defendants that their demands were excessive and further that they failed to pay the taxes timely although funds were available to pay said taxes.

14. Further, that the defendants had failed and refused to furnish paid receipts to your plaintiff to support alleged disbursements from your plaintiff's escrow account, as repeatedly requested from time to time by your plaintiff.

15. That commencing in June 1965 and throughout the subsequent mortgage period, including April 30, 1968, plaintiff had paid to the defendants, sums of money as an additional payment to reduce the principal thereon consistently, each month.

16. That the plaintiff, on April 26, 1968, further informed the defendants, Metropolitan Federal Savings and Loan Association, Roger C. Richards, President, and John C. Denyer, Assistant Vice-President, that your plaintiff would make payments on the principal and interest but

not of the taxes and insurance because defendants had breached their agreement in failing and refusing to pay the taxes timely; further, that the defendants had failed and refused to furnish your plaintiff with receipts to support such disbursements from plaintiff's escrow account, from time to time, and as per defendant's letter dated April 25, 1968.

17. That almost immediately, and without any prior notice to plaintiff, the defendants, Metropolitan Federal Savings and Loan Association, declared the mortgage in default and began publication in the Detroit Legal News of notice of mortgage sale, by public auction, on your plaintiff's residence, of which notice was published May 23 and May 30, June 6, 13, 20 and 27, July 4, 11, 18 and 25, August 1, 8 and 15, 1968.

18. That on October 1, 1968, the Sheriff of Wayne County executed the Deed on the mortgage sale to the mortgagee who bid in on said sale.

19. That the Sheriff sold the property to the defendants, Metropolitan Federal Savings and Loan Association, on October 1, 1968, for Twelve Thousand Six Hundred Eleven Dollars and Forty-six cents ($12,611.46).

20. That the defendants had accepted your plaintiff's timely payment of April 30, 1968, which included additional principal; that the defendants noticed the mortgage sale by publication on May 23, 1968; and further, that the defendants refused to credit your plaintiff with her May 29, 1968, timely payment and defendants refused to accept payments from your plaintiff for June and July 1968, as timely offered by your plaintiff.

21. That in June of 1969 the property was redeemed by your plaintiff for the sum of Thirteen Thousand Seven Hundred Nineteen Dollars and Eighty-Three Cents ($13,719.83).

22. That the principal balance on May 23, 1968, the date of publication of mortgage sale, was Twelve Thousand Forty ($12,040.00) Dollars and that the defendants, Metropolitan Federal Savings and Loan Association have enriched themselves unjustly in the sum of Eleven Hundred ($1,100.00) Dollars.

23. That your plaintiff paid the city taxes in July 1968 on the property subsequent to the notice of the mortgage sale as of May 23, 1968, but that the defendants deliberately prevented your plaintiff from paying the county and school taxes in December 1968.

24. That at the time of the notice of foreclosure and to this date the mortgage market in the Metropolitan Detroit area has been "tight" and mortgage funds are difficult to obtain.

25. That the interest rate on mortgages have increased since 1963 causing your plaintiff to pay seven (7%) percent interest after experiencing great difficulty in obtaining a proper mortgage, to redeem her property.

26. That the defendants and all of them have slandered and defamed the plaintiff publicly throughout the County of Wayne by their publication in the Detroit Legal News, by misrepresenting that the plaintiff was in default of said mortgage.

27. That the defendants wrongfully, willfully, and negligently jeopardized the security of the plaintiff and publicly subjected your plaintiff

by inuendo that she was financially irresponsible all of which was detrimental to the credit standing of your plaintiff.

28. That subsequently on August 22, 1968, the defendants Metropolitan Federal Savings and Loan Association advised your plaintiff by mail addressed to her personally of her A-1 credit and invited her to borrow money from the defendants, Metropolitan Federal Savings and Loan Association, while the said foreclosure action was pending and only a few days prior to the Sheriff's sale of your plaintiff's mortgage of October 1, 1968.

29. That the defendants failed and neglected to pay county taxes during the years 1963 and 1964, creating penalties and interest accrued.

30. That the defendants failed and neglected to pay city taxes in 1964, creating a penalty.

31. That the defendants failed and neglected to pay 1965 city taxes timely in 1965, creating a penalty.

32. That the defendants failed and neglected to pay 1967 city taxes timely, in 1967, creating a penalty.

33. That the defendants periodically demanded an excessive amount of escrow by mathematical trick and subterfuge by projecting their computations contrary to the terms of the mortgage agreement.

34. That on April 25, 1968, Defendant Roger C. Richards wrote your plaintiff a letter, in response to her many and repeated requests for receipts in support of the disbursements from her escrow account; that the said letter contained

language insulting your plaintiff and refusal to furnish the said requested receipts.

35. That on April 26, 1968, upon receiving defendant Roger C. Richard's letter dated April 25, 1968, in view of all said circumstances as above, your plaintiff stated that she would make payments of interest and principal in the future and pay her taxes, insurance, etc. directly, rather than in escrow to the Defendants Metropolitan Federal Savings and Loan Association, so as to assure prompt payment and to obtain receipts for the same.

36. Subsequent to the publication of foreclosure of May 23, 1968, your plaintiff was harassed and imposed upon by various and several realtors, mortgage companies, lending institutions and solicitors and individuals, regarding the said foreclosure publications as caused by the defendants, Metropolitan Federal Savings and Loan Association; said harassment and imposition was by mail, by telephone and in person and that some of the said people were so persistent as to invade and trespass to the rear of plaintiff's residence, invading your plaintiff's privacy in her patio and back-yard and garage while the said individuals and solicitors inspected and/or surveyed the premises, as caused by the defendants, Metropolitan Federal Savings and Loan Association foreclosure publication of your plaintiff's residence, all of which created embarassment and humiliation to your plaintiff and in open view of her neighbors.

37. That during July and August 1968, when your plaintiff was in the lobby of the City-County Building, she was approached by court personnel who chided and ridiculed your plaintiff by saying "Mrs. Cramer, why don't you pay your bills" and reference was made by such court

personnel to the foreclosure publication, which again was humiliating and embarassing causing your plaintiff great discomfort, as caused by the defendants' wrongful and malicious foreclosure action.

38. That the plaintiff incurred legal and closing expenses in obtaining a new mortgage.

39. That your plaintiff has to pay many thousands of dollars in increased interest because of defendants' wrongful and malicious foreclosure.

Wherefore Plaintiff asks that Judgment be granted against the defendants, jointly and severally, in the sum of One Hundred Thousand ($100,000.00) Dollars.

Virginia Cramer

Virginia Cramer
March 12, 1970 Plaintiff in pro per
Jurat

MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT TO CONFORM TO ADDITIONAL AND NEW EVIDENCE

(State of Michigan--Circuit Court--County of Wayne--Filed March 16, 1970)

Virginia Cramer, plaintiff in pro per in the above entitled action, moves the court for leave to file her Second Amended Complaint to Conform to Additional and New Evidence, copy attached hereto, for the reasons shown by the attached affidavit.

Virginia Cramer
March 12, 1970 Plaintiff in pro per

Supporting Affidavit
State of Michigan
County of Wayne--ss

Virginia Cramer being duly sworn says:

1. That she is the plaintiff in the above entitled action.

2. That said action was commenced on August 12, 1968, and is for damages resulting from breach of mortgage contract, defamation and slander by publication, malfeasance, negligence and malicious misconduct with malice aforethought maintained by defendants up to that time.

3. That since the commencement of this action plaintiff has suffered additional damages and finds it desirable to file a Second Amended Complaint for such damages to the date of trial.

Virginia Cramer
March 12, 1970 Affiant, Plaintiff in pro per
Short Jurat

APPENDIX "F"

NOTICE OF HEARING
(State of Michigan--Circuit Court--County of Wayne --Filed March 26, 1970)

To: Virginia Cramer, Plaintiff
27314 Clairview Drive
Dearborn Heights, Mich. 48127

Please take notice that the attached Order Denying Plaintiff Leave to File Second Amended Complaint and Denying Plaintiff's Demand for Jury Trial will be presented for entry by the Honorable

Edward F. Bell, Judge of the Circuit Court in his court room in the City-County Building, City of Detroit, on Friday, April 3, 1970 at 2:00 in the afternoon or as soon thereafter as counsel can be heard.

McClintock, Fulton, Donovan & Waterman
By William P. Thorpe
Attorneys for the Defendants

ORDER DENYING PLAINTIFF LEAVE TO FILE SECOND AMENDED COMPLAINT AND DENYING PLAINTIFF'S DEMAND FOR JURY TRIAL

(State of Michigan--Circuit Court--County of Wayne--Filed March 30, 1970)

At a session of said Court held in the Court Room in the City-County Building in the City of Detroit, on the day of March 30, 1970.

Present: Hon. Edward F. Bell

This matter having come on to be heard on Plaintiff's Motion for Leave to File Second Amended Complaint, and upon Plaintiff's Motion for Order Granting Demand for Jury Trial, and the Court having examined the pleadings, exhibits and memoranda which have been filed, and having heard oral argument by the Plaintiff and the attorneys representing the Defendants; and the Court having determined that the matter in Plaintiff's proposed Second Amended Complaint is based upon Plaintiff not being in default of her mortgage, and this Court having previously determined on September 27, 1968 that the Plaintiff was in default on her mortgage and the matter is therefore res judicata; and the Court further having determined that Plaintiff waived trial by jury by

by failure to so demand within the time limits in the General Court Rules; and the Court being fully advised in the premises, now therefore,

It is hereby ordered and adjudged that the Plaintiff is denied leave to file her Second Amended Complaint.

It is further ordered and adjudged that the Plaintiff's Motion for trial by jury is denied.

Edward F. Bell
Circuit Judge

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(State of Michigan--Circuit Court--County of Wayne--Filed May 29, 1970)

At a session of said Court, held in the City-County Building, Two Woodward Avenue, Detroit, Michigan on the 29 day of May, 1970 before the Honorable Edward F. Bell.

Upon reading and filing of Defendant's Motion for Summary Judgment and after oral argument by the attorneys for the parties, and the Court being fully advised in the premises, now therefore,

It is hereby ordered and adjudged that the Defendants' Motion for Summary Judgment is granted and that a judgment be entered dismissing Plaintiff's Complaint with prejudice.

Edward F. Bell, Circuit Judge

APPENDIX "G"

COURT OF APPEALS OPINION

(State of Michigan--Court of Appeals--
Division I--Filed July 22, 1971)

Before: Danhof, P.J., McGregor and Levin.
Per Curiam (Reported at 34 Mich App 638)

The plaintiff, Virginia Cramer, executed a note secured by a mortgage on her home in favor of the defendant, Metropolitan Federal Savings and Loan Association. The monthly installments of principal and interest were timely paid; indeed, she made substantial prepayments of principal. A dispute arose concerning the amount required to be paid to Metropolitan Federal under a provision in the mortgage obligating Mrs. Cramer to deposit monthly with the mortgagee, in escrow, sums to pay real property taxes and hazard and mortgage insurance premiums.

Metropolitan Federal Commenced foreclosure proceedings by advertisement, and Mrs. Cramer commenced this action claiming she had a defense to the foreclosure and that Metropolitan Federal had demanded excessive escrow deposits and mishandled and failed properly to apply funds she had deposited in escrow. Injunctive relief and money damages were sought.

A circuit judge entered a temporary restraining order and order to show cause why a preliminary injunction should not be entered. Subsequently a hearing was held on the order to show cause and on September 27, 1968, the circuit judge entered an order finding that Mrs. Cramer was "in default on her mortgage," dissolving the temporary restraining order and expressly permitting Metropolitan Federal to proceed with

the foreclosure.

On March 16, 1970, Mrs. Cramer sought to file an amended complaint and a demand for a jury trial. In her amended complaint she alleged that in June, 1969, she had exercised her right of redemption from the foreclosure sale. She claimed further that, as a result of the rise in interest rates since 1963 (when the mortgage made by Metropolitan Federal was executed) and because of other charges made by Metropolitan Federal and expenses and damages incurred by her, she had been damaged by Metropolitan Federal's wrongful foreclosure of the mortgage.

A circuit judge (not the judge who had heard the matter in 1968) entered an order denying Mrs. Cramer's request to file an amended complaint and denying her demand for a jury trial; and subsequently he entered a summary judgment dismissing her complaint on the ground that the 1968 finding that she was in default made at the time the temporary restraining order was dissolved was res judicata. Mrs. Cramer appealed. We reverse and remand for further proceedings.

The summary 1968 hearing on the order to show cause was not a trial hearing. The transcript, 16 pages in length, is largely colloquy between the lawyers and the judge. One witness for Metropolitan Federal was sworn and gave testimony. Mrs. Cramer's evidence was not heard. (Emphasis added)

In deciding whether to enter, continue or dissolve a temporary restraining order or a preliminary injunction, a circuit judge may properly proceed summarily and informally, depending on the exigencies of the situation, but his factual findings and determinations arrived at in such manner are not a substitute for a full trial

hearing on the allegations of the complaint and the issues framed by the pleadings. See Hopkins v Crantz (1952), 334 Mich 300, 303, holding that the refusal of a temporary injunction does not preclude later entry of a permanent injunction; the Michigan Supreme Court there observed: "Decision on a preliminary motion in no way affects a final decree."

The dissolution of the temporary restraining order in the present case did not end Mrs. Cramer's action (citations omitted) which sought money damages as well as injunctive relief. She was entitled to a full trial hearing on her claims that Metropolitan Federal wrongfully foreclosed the mortgage and was guilty of other wrong doing and that, in consequence, money damages should be awarded to her.

It was entirely appropriate for Mrs. Cramer to file an amended complaint in the light of the additional facts. After the 1968 hearing the mortgage made by Metropolitan Federal was foreclosed and Mrs. Cramer exercised her right of redemption. The factual setting changed sufficiently after the 1968 hearing so that Mrs. Cramer was entitled to file an amended complaint restating and amending her allegations. A pleading is required to state the facts upon which the pleader relies in stating his cause of action "with such specific averments as are necessary reasonably to inform the adverse party of the nature of the cause he is called upon to defend." GCR 1963, 111.1(1). The court rules also provide that leave to amend "shall be freely given when justice so requires." GCR 1963, 118.1.

On remand the circuit court shall exercise its discretion under GCR 1963, 509.2 in passing on Mrs. Cramer's delayed demand for a jury trial.

Reversed and remanded for further proceedings consistent with this opinion. Costs to plaintiff.

APPENDIX "H"

SECOND AMENDED COMPLAINT

(State of Michigan--Circuit Court--County of Wayne--Filed July 23, 1971)

Now comes Plaintiff Virginia Cramer by her attorneys, Allen J. Counard and D. Lawrence Kevelighan, and in her Second Amended Complaint says:

Count I - Breach of Contract

1. That she is a resident of Dearborn Heights, Wayne County, Michigan.

2. That the Defendant Metropolitan Federal Savings and Loan Association is a United States corporation and that its principal place of business is located in the City of Detroit, County of Wayne, State of Michigan.

3. That the Defendant James I. McClintock is and was Chairman of the Board of Directors of Metropolitan Federal Savings and Loan Association at all times pertinent hereto.

4. That the Defendant Roger C. Richards is and was President of Metropolitan Federal Savings and Loan Association at all times pertinent hereto.

5. That the defendant John C. Denyer is and was Assistant Vice-President of Metropolitan

Federal Savings and Loan Association at all times pertinent hereto.

6. That the Plaintiff on July 29, 1963, entered into a contract to purchase property situated in the City of Dearborn Heights, County of Wayne, State of Michigan, described as follows: The East 33 feet of Lot 5 and West 24 feet of Lot 6 of Gordon Saperstein Subdivision No. 1 and part of the Southwest quarter of Section 6, Town 2 South, Range 10 East, Dearborn Township, Wayne County, Michigan as recorded in Liber 80, Page 2, Wayne County Records.

7. That Plaintiff, in order to purchase the aforementioned property, borrowed from Defendant Metropolitan Federal Savings and Loan Association Sixteen Thousand Five Hundred ($16,500.00) Dollars with interest thereon at the rate of five and three-quarters (5-3/4%) per cent per annum while not in default and seven (7%) per cent per annum during the period of any default and Plaintiff signed a "Mortgage Note" for same dated the 29th day of July, 1963, Plaintiff thereby agreeing to pay said sum.

8. That pursuant to the aforementioned "Mortgage Note" the Defendant Metropolitan Federal Savings and Loan Association could, at its option, in lieu of increasing the rate of interest as above provided during the period of any default, collect a "late charge" not to exceed an amount equal to four (4%) per centum of any installment which is not paid within fifteen (15) days from the due date thereof, to cover the extra expense involved in handling delinquent payments.

9. That the Plaintiff received from Defendant Metropolitan Federal Savings and Loan Association payment cards which clearly indicated there-

on that no late charges would be due during the fifteen (15) day grace period, and that Plaintiff to avoid late charges, should pay within said fifteen (15) day period.

10. That pursuant to the terms of the aforementioned "Mortgage Note" Plaintiff expressly reserved the right to prepay installments of principal.

11. That Plaintiff, during the period of July 29, 1963 through and including May 14, 1968, made one hundred thirty (130) payments of principal when only fifty-six (56) payments were regularly scheduled during said period.

12. That paragraph 2 of the aforementioned "Mortgage" agreement reads as follows:

> "In order more fully to protect the security of this mortgage, in addition to the monthly installments of principal and interest, to pay to mortgagee an installment of the taxes and assessments levied or to be levied against said premises that will next become due, an installment of the premium or premiums that will next become due to renew the insurance on said premises (as hereinafter provided) and, if any life insurance is payable or assigned to mortgagee as additional security for said indebtedness, an installment of the premium or premiums that will next become due thereon. The said installments shall be equal, respectively, to the taxes and assessments next due and the premiums for such insurance, as estimated by mortgagee, less all sums already paid therefor, divided by the number of months to elapse before one month prior to the

date when such taxes, assessments and premiums will become due, such sums to be held by mortgagee, without interest thereon, to pay said taxes, assessments and premiums when due. All payments for principal, interest, taxes, assessments and premiums shall be added together and the aggregate amount thereof shall be paid by mortgagor to mortgagee each month in a single payment. If the sums so deposited shall not be sufficient to pay the taxes, assessments and premiums when the same become due, mortgagor agrees to forthwith pay to mortgagee the amount of the deficiency, and if said deposits shall exceed the amount actually paid by mortgagee therefor, the excess shall be credited upon principal."

13. That Defendant Metropolitan Federal Savings and Loan Association estimated the amounts necessary to pay taxes, assessments and insurance on said property and added this amount to the monthly principal and interest payment and sent plaintiff payment cards for the total monthly payment due.

14. That Defendant Metropolitan Federal Savings and Loan Association on various occasions breached the "Mortgage" agreement by failing to pay the taxes on the above property when due, thereby allowing said taxes to become delinquent.

15. That Plaintiff had timely paid escrow monies which were accepted by Defendant.

16. That Defendant Metropolitan Federal Savings and Loan Association breached the "Mortgage" agreement by not crediting to Plaintiff's principal account escrow monies not actually

paid out of by the Defendant-Mortgagee during the yearly estimate period.

17. That the aforementioned payment cards stated that the payments were due on the fifteenth (15th) of each month and late charges would be added after the thirtieth (30th) of each month.

18. That the aforementioned payment cards were part of the agreement between the parties and allowed Plaintiff to have a fifteen (15) day period beyond the due date to pay.

19. That Plaintiff made payments pursuant to the sums stated on the payment cards through May 14, 1968.

20. That Defendant breached the agreement between the parties on May 23, 1968, by causing to be published in the Detroit Legal News a "Notice of Mortgage Sale" because the payment due on May 15, 1968, had not been made.

21. That Defendants "Notice of Mortgage Sale" publication of May 23, 1968, stated that ". . . on which mortgage there is claimed to be due at the date of this notice, the sum of Twelve Thousand Five Hundred Nineteen and 37/100 ($12,519.37) Dollars . . ."

22. That Defendants' records showed the principal balance owing as of May 23, 1968, to be Twelve Thousand Forty-One and 91/100 ($12,041.91) Dollars.

23. That Defendants' records showed no monies were advanced by the Defendants for taxes, assessments or insurance premiums as of May 23, 1968, the date of said foreclosure publication.

24. That the taxes, assessments and insurance premiums due or to become due on said mortgaged property are titleholder's liabilities and that plaintiff's liability for taxes, as titleholder of said property, is irrevocable, non-assignable and non-transferable.

25. That plaintiff's liability for taxes, assessments and insurance premiums is not an indebtedness owed to Defendant-Mortgagee as Defendant-Mortgagee had not advanced any of its money as payment for said liabilities as of May 23, 1968.

26. That no liabilities for taxes, assessments and insurance premiums were due or overdue as of May 23, 1968, on plaintiff-titleholder's aforementioned property.

27. That Defendants proceeded with their mortgage sale.

28. That Plaintiff, subsequent to said mortgage sale, redeemed the aforementioned property.

29. That as a result of Defendants' aforementioned acts, Plaintiff was forced to obtain a new mortgage on the aforementioned property at a higher rate of interest, that being at seven (7%) per cent per annum.

30. That Plaintiff incurred attorney fees because of the Defendants aforementioned actions of breach of contract.

31. That the aforementioned mortgage note was originally held out to be at five and one-half (5-1/2%) per cent per annum, but that the note as signed at five and three-quarters

(5-3/4%) per cent per annum was held out by Defendants to include the additional one-quarter of one (1/4 of 1%) per cent per annum for mortgage insurance through Mortgage Guaranty Insurance Corporation (MGIC).

32. That Defendants, when estimating escrow amounts, again included amounts for mortgage insurance.

33. That Plaintiff was not furnished each and every year a statement of disbursements from her escrow account, although request therefore was made and Plaintiff was thus deprived of necessary information to easily fulfill her personal Federal Income Tax obligations in a timely and exact manner.

34. That as a result of Defendants breach of contract Plaintiff has suffered the following damages to wit:

(a) Total difference in interest rates of plaintiff's original mortgage with defendant and her new mortgage: $5,032.30

(b) Costs of foreclosure: $1,188.74

(c) Closing costs in obtaining new mortgage: $160.50

(d) Legal fees incurred to date: $2,957.30

Wherefore your Plaintiff prays that this Honorable Court grant judgment against the Defendant Metropolitan Federal Savings and Loan Association on the within Count I in the amount of Nine Thousand Three Hundred Thirty-Eight and 84/100 ($9,338.84) Dollars.

Count II - Abuse of Process

35. Plaintiff realleges paragraphs 1 through 34 of Count I.

36. That during the period July 29, 1963, through May 14, 1968, the plaintiff had at various times complained to Defendant Metropolitan Federal Savings and Loan Association and various of its employees, agents, officers and directors about the non-timely payment of her property taxes on the aforementioned property.

37. That during the period July 29, 1963, through May 14, 1968, the Plaintiff had at various times complained to the Defendant Metropolitan Federal Savings and Loan Association and various of its employees, agents, officers and directors about what Plaintiff felt was a miscalculation of the estimates for her escrow account.

38. That Plaintiff, on or about the last part of April 1968 or the first part of May 1968, telephoned Defendant James I. McClintock in his capacity as Chairman of the Board of Directors of Metropolitan Federal Savings and Loan Association and Plaintiff informed him of the non-payment and/or delinquent payment of the property taxes on the aforementioned property and she was told there was nothing wrong with her taxes being in default.

39. That because of the aforementioned non-timely payment of the property taxes and the aforementioned claimed miscalculations of her escrow account, Plaintiff asked to pay her own obligations rather than pay the escrow sums.

40. That Plaintiff's request to pay her own

taxes, assessments and insurance because of the past actions of Defendants' were met with great resistance and a denial of her request.

41. That Plaintiff brought to the attention of Defendants the non-timely payment of her property taxes, the miscalculation of her escrow fund and their breach of the "Mortgage Note" and "Mortgage Agreement".

42. That in May 1968, prior to the foreclosure publication, Defendant John C. Denyer told Plaintiff to "hire a bookkeeper and a lawyer."

43. That in the period February 21, 1968 to April 19, 1968, Plaintiff received two different sets of payment cards in addition to the set of payment cards she was then making payments with.

44. That in the early part of April 1968, Plaintiff asked Defendant John C. Denyer for receipts for all disbursements from her escrow account but was denied same.

45. That Plaintiff received a letter from Defendant Roger C. Richards, dated April 25, 1968, denying Plaintiff's request for the aforementioned receipts.

46. That Defendants response to the aforementioned rightful complaints and justifiable demands of Plaintiff was to institute foreclosure by Sheriff's sale.

47. That the first said publication of foreclosure appeared in the Detroit Legal News on May 23, 1968.

48. That said first publication of Mortgage

Sale was well within the aforementioned fifteen (15) day period when no late charges would be assessed.

49. That the Defendants caused to be posted in public places a copy of said publication, to wit: in the City-County Building, Two Woodward Avenue, Detroit, Michigan, and on the aforementioned property of the plaintiff.

50. That on October 1, 1968, the Sheriff of Wayne County executed a deed to the aforementioned property to Defendant Metropolitan Federal Savings and Loan Association who bid in on said Sheriff's sale.

51. That the Defendants maliciously, knowingly, and in a calculating manner, and in utter disregard of the aforementioned "Mortgage Note", "Mortgage" agreement, and payment cards, had preconceived the aforementioned foreclosure in a manner they knew, or should have known, was an Abuse of Process and not proper under the circumstance.

52. That in view of the past exemplary payment-record of the plaintiff,the Defendants election of the acceleration clause of the "Mortgage" agreement was unwarranted, unjust and an Abuse of Process.

53. That under the existing circumstances the institution of foreclosure by Sheriff's sale was an Abuse of Process, was harsh, unjust and unwarranted.

54. That in view of the bona fide dispute between the parties as to the calculation and handling of Plaintiff's escrow funds, the institution of foreclosure by Sheriff's sale

was an Abuse of Process.

56. That Plaintiff believes the Defendants have not foreclosed on other mortgagors within the aforementioned fifteen (15) day period.

57. That Plaintiff believes the Defendants have not foreclosed on other mortgagors with a history of payment as exemplary as hers.

58. That Plaintiff believes Defendants acted in the unwarranted illegal and unjustified manner herein alleged, partly because she is a single woman.

59. That Defendant Roger C. Richards wrote plaintiff a letter in August 1968 complimenting plaintiff on her exceptional payment record.

60. That all of the aforementioned acts of Defendants were malicious, were without any just or probable cause, were illegal and oppressive, and were done with a wanton and reckless disregard of the rights of the Plaintiff and with the intent of causing Plaintiff to lose her home.

61. That Defendants had an ulterior motive or purpose in exercising such use of process.

62. That the actions of Defendants damaged Plaintiff's good reputation in the community.

63. That the actions of Defendants damaged Plaintiff's credit standing in the community.

64. That the actions of Defendants caused Plaintiff much mental distress, some physical ill health, nervousness and tension.

Wherefore your Plaintiff prays that this Honorable Court grant judgment for general, exemplary and punitive damages against the Defendants, jointly, individually and severally, on the within Count II in the amount of One Hundred Thousand and No/100 ($100,000.00) Dollars.

Count III -- Libel and Slander

65. Plaintiff realleges paragraphs 1 through 64 of Counts I and II.

66. That Defendants, on or about May 16, 1968, maliciously prepared and composed, of and concerning Plaintiff, a certain writing, to wit:

"McClintock, Fulton, Donovan & Waterman, Attys.,
2150 Guardian Bldg., Detroit,
Michigan 48226.
No. 01 04-6326

Notice of Mortgage Sale--Default having been made in the conditions of a certain mortgage made by Virginia Cramer to Metropolitan Federal Savings and Loan Association, a United States corporation, dated the 29th day of July, 1963, and recorded in the office of the Register of Deeds for the County of Wayne and State of Michigan, on the 13th day of August, 1963, in Liber 15124, of Wayne County Records, on Page 270, on which mortgage there is claimed to be due at the date of this notice, the sum of Twelve Thousand Five Hundred Nineteen and 37/100 ($12,519.37) Dollars, and an attorney's fee as provided for in said mortgage, and no suit or proceedings at law having been instituted to

recover the moneys secured by said mortgage, or any part thereof,

Notice is hereby given, that by virtue of the power of sale contained in said mortgage, and the statute in such case made and provided, on Tuesday, the 20th day of August, 1968, at twelve o'clock noon, Local Time, the undersigned will, at the Southerly or Jefferson Avenue entrance to the City-County Building, in the City of Detroit, Michigan, that being the place where the Circuit Court for the County of Wayne is held, sell at public auction, the premises described in said mortgage, or so much thereof as may be necessary to pay the amount then due on said mortgage, including legal costs and attorney's fees, and taxes or insurance that the undersigned may pay on or prior to the date of said sale, and interest at 7 per cent per annum thereon, which said premises so to be sold are situated in the City of Dearborn Heights, County of Wayne, Michigan, and are described as:

East 33 feet of Lot 5 and West 24 feet of Lot 6 of Gordon-Saperstein Subdivision No. 1 of Part of the SW 1/4 of Sec. 6, T2SR10E, Dearborn Township WCM As Recorded in L80 P2 Wayne County Records.

The redemption period as determined under Stat. Ann. 27A.3240 is one year from the time of such sale.

Dated May 23, 1968

Metropolitan Federal Savings and Loan Association, A United States corporation, Mortgagee . . . "

67. That said writing was false in that Plaintiff was not in default on her "Mortgage Note" and "Mortgage" agreement.

68. That Defendants knew, or should have known, that said writing was false.

69. That Defendants delivered said writing to the Detroit Legal News and caused said writing to be published on May 23 and 30, 1968; June 6, 13, 20 and 27, 1968; July 4, 11, 18 and 25, 1968; and August 1, 8 and 15 of 1968.

70. That pursuant to the Defendants malicious intent said writing was read by many and diverse persons.

71. That Plaintiff received telephone calls and mail from individuals, realtors, mortgage companies, etc., referring to said written publication, and was embarrassed and imposed upon to the extent of having various persons trespass upon her premises at various times of the day to measure, survey, appraise and inspect the premises, all of which embarrassed, humiliated, disgraced and frightened Plaintiff, in open view of her friends and neighbors.

72. That an individual asked why Plaintiff did not pay her debts.

73. That Plaintiff had great difficulty securing a new mortgage as her credit standing in the community had been defamed and impaired and that several reputable lending institutions in the community refused to lend her funds to redeem the aforementioned property.

74. That the new mortgage secured by Plain-

tiff bore a higher rate of interest than that with Defendant Metropolitan Federal Savings and Loan Association.

75. That Plaintiff had, prior to the aforementioned publication, enjoyed a good reputation for payment of her obligations, dealing honestly with other parties, and being of good and upright character.

76. That immediately upon learning of the first of said publications Plaintiff demanded that Defendants cease and desist all further publications.

77. That said wrongful publication caused Plaintiff much mental distress, physical ill health, nervousness and tension.

78. That Defendants, in disregard of the demands of Plaintiff, continued to allow said publication.

79. That as a result of said publication Plaintiff sustained damages by way of increased interest on her subsequent mortgage in the amount of Five Thousand Thirty-Two and 30/100 ($5,032.30) Dollars, attorney fees to prosecute her just, legal and rightful claims in the amount of Two Thousand Nine Hundred Fifty-Seven and 30/100 ($2,957.30) Dollars, as well as damage to her personal reputation and character all as heretofore alleged in excess of Ninety-Two Thousand and No/100 ($92,000.00) Dollars.

Wherefore your Plaintiff prays that this Honorable Court grant judgment against the Defendants, jointly, individually and severally, for general, special, exemplary and

punitive damages on the within Count III in the amount of One Hundred Thousand and No/100 ($100,000.00) Dollars.

Count IV -- Breach of Fiduciary Relationship

80. Plaintiff realleges paragraphs 1 through 79 of Counts I, II and III.

81. That pursuant to aforementioned paragraph 2 of the aforementioned "Mortgage" agreement Defendant Metropolitan Federal Savings and Loan Association was to hold the escrow funds of Plaintiff interest free.

82. That Defendants were in a position of trust as regards to the handling of Plaintiff's escrow funds.

83. That there was between Plaintiff and Defendant a fiduciary relationship as regards the escrow money forwarded at various times by Plaintiff to Defendant Metropolitan Federal Savings and Loan Association.

84. That Defendant Metropolitan Federal Savings and Loan Association did not pay taxes on the aforementioned property and did not credit Plaintiff's principal account with sums not expended in a twelve-month estimate period and thus breached the aforementioned fiduciary relationship and position of trust.

85. That the Defendant Metropolitan Federal Savings and Loan Association held Plaintiff's funds beyond a twelve-month escrow estimate period without paying Plaintiff interest on said funds thereby breaching the aforementioned fiduciary relationship and position of trust.

86. That Defendant Metropolitan Federal Savings and Loan Association utilizes the escrow funds of Plaintiff for its own purposes and use while not applying said escrow funds for the benefit of Plaintiff as it was bound to do thereby breaching the aforementioned fiduciary relationship and position of trust.

87. That Defendant Metropolitan Federal Savings and Loan Association utilized the escrow funds of Plaintiff for its own purposes and use while not paying Plaintiff interest for the use of said funds thereby breaching the aforementioned fiduciary relationship and position of trust.

88. That Defendant Metropolitan Federal Savings and Loan Association demanded from Plaintiff escrow funds in excess of the funds necessary to pay taxes, assessments and insurance on the aforementioned property during a twelve-month escrow estimate period, thereby breaching the aforementioned fiduciary relationship and position of trust.

89. That the acts alleged in this Count IV were done in a calculating, malicious and deliberate manner and intended to deprive Plaintiff of her rights and money and Defendant thereby breached the aforementioned fiduciary relationship and position of trust.

Wherefore your Plaintiff prays that this Honorable Court grant Judgment for general, special, exemplary and punitive damages against the Defendant Metropolitan Federal Savings and Loan Association on the within Count IV in the amount of One Hundred Thousand and No/100 ($100,000.00) Dollars..

Count V -- Invasion of Privacy

90. Plaintiff realleges paragraphs 1 through 89 of Counts I, II, III and IV.

91. That the aforementioned publications and posting of notices were unlawful and malicious and without legal right or authority.

92. That Defendants claim of "default" against Plaintiff was false and any claim of deficiency or default because of claimed escrow shortages was disputed by the Plaintiff and known by the Defendants to be so disputed.

93. That said publications and posting of notices caused Plaintiff humiliation, embarrassment, exposure to public contempt and ridicule, disgrace, and mental distress.

94. That the aforementioned acts of Defendants were wanton and irresponsible, and warrant an award of exemplary damages.

95. That Defendants knew, or should have known, the damages that would result from the aforementioned publication and posting of notices.

Wherefore your Plaintiff prays that this Honorable Court grant judgment for general, special, exemplary and punitive damages against the Defendants, jointly, individually and severally, on the within Count V in the amount of One Hundred Thousand and No/100 ($100,000.00) Dollars.

Count VI -- Intentional Infliction Of Emotional Distress

96. Plaintiff realleges paragraphs 1 through 95 of Counts I, II, III, IV and V.

97. That the aforementioned acts and conduct of Defendants amount to intentional infliction of emotional distress upon the Plaintiff.

98. That the aforementioned acts and conduct of Defendants were done in a reckless, wanton, intentional and malicious manner of ill will toward the Plaintiff with utter disregard of the rights, feelings or property of the Plaintiff.

99. That the aforementioned acts and conduct of Defendants warrant an award of general, special, exemplary and punitive damages.

Wherefore your Plaintiff prays that this Honorable Court grant judgment for general, special, exemplary and punitive damages against the Defendants, jointly, individually and severally, on the within Count VI in the amount of One Hundred Thousand and No/100 ($100,000.00) Dollars.

Counard & Kevelighan
By: /s/ Allen J. Counard
Attorneys for Plaintiff
17663 West Ten Mile Road
Southfield, Michigan 48075
Telephone: 557-6920

Demand For Trial By Jury

Comes now the above Plaintiff and respectfully demands Trial by Jury in the above entitled cause.

Counard & Kevelighan
By: /s/ Allen J. Counard

APPENDIX "Ha"

AFFIRMATIVE DEFENSES

Now come the Defendants by their attorneys, McClintock, Fulton, Donovan & Waterman, and state the following Affirmative Defenses to Counts I through VI, inclusive, of the Plaintiff's complaint.

1. That Plaintiff was in default under the terms and conditions of her mortgage for the reason that her escrow account was deficient in the amount of $401.03, more or less, at the time of foreclosure and had been deficient for a long period of time prior thereto.

2. That Defendant was adjudged in default in the terms of her mortgage, and permission to proceed with the foreclosure action given by order of this Court dated September 27, 1968.

3. That all acts, communications and publications alleged by Plaintiff were performed by Defendants with reasonable and probable cause, and in good faith, without malice and without intent of harming Plaintiff, that such facts concerning the status of her escrow account and mortgage payments were in substance and in fact true and correct.

4. That the writing alleged in paragraph 66 of Plaintiff's complaint is true in substance and in fact.

5. That all publications, communications and acts performed by the Defendants were privileged in that they were undertaken pursuant to Public Acts 1961, No. 236 of the State of Michigan

(M.C.L.A. 600.3201 et seq; M.S.A. 27a. 3201 et seq.)

6. That Plaintiff waived all right to damages by written consent to the acts, communications and publications alleged in her complaint by agreeing to the terms of the mortgage heretofore alleged.

7. That the inclusion of the terms and conditions in paragraph 2 of Plaintiff's mortgage relating to escrow requirements, and the method of computation thereof, were required by the Rules and Regulations for the Federal Savings and Loan System as promulgated by the Federal Home Loan Bank Board, pursuant to the Home Owner's Loan Act of 1953, as amended.

8. That the aforesaid order of this Court dated September 27, 1968, is res judicata as to the issue of Plaintiff's default in the terms of her mortgage.

9. That the Defendant, Metropolitan Federal Savings & Loan Association, is a corporation duly organized and existing under and by virtue of the laws of the United States of America, and the Defendant, James I. McClintock, Roger C. Richards, John C. Denyer and the other individual Defendants are officers, directors or employees of the aforesaid corporation and all acts, communications and publications alleged by Plaintiff concerning the named individuals were pursuant to the laws of the United States of America, the State of Michigan and the Charter of the corporation; and that liability, if any, under Plaintiff's complaint, is that of the corporation and not that of the individual Defendants.

Wherefore, Defendants pray that Plaintiff's complaint be dismissed with costs and attorneys' fees.

McClintock, Fulton, Donovan & Waterman
By: /s/ William P. Thorpe
2150 Guardian Building
Detroit, Michigan 48226
Telephone: 963-3400
Dated: August 6, 1971

APPENDIX "Hb"

PLAINTIFF'S ANSWER TO DEFENDANTS AFFIRMATIVE DEFENSES

(State of Michigan--Circuit Court--County of Wayne--Filed August 16, 1971)

Now comes Plaintiff Virginia Cramer by her Attorneys, Allen J. Counard and D. Lawrence Kevelighan, and for answer to defendants Affirmative Defenses says as follows:

1. Answering paragraph number 1 Plaintiff denies the allegations contained therein for the reason that same are not true. Further, plaintiff states that escrow is not a factor in a conventional mortgage foreclosure in that defendant had not expended any of its own monies nor had it made demand on plaintiff for any money allegedly expended by it, nor had they made demand for any alleged deficiency as they were bound to do pursuant to paragraph number 2 of the mortgage agreement.

2. Answering paragraph number 2 plaintiff denies the allegations contained therein for the reason that same are not true and plaintiff

states further that the Court of Appeals has found in its opinion dated June 25, 1971, that this Order was merely a denial of a request for injunctive relief asked for by the plaintiff and that plaintiff is free to litigate the question of wrongful foreclosure in a trial on the merits, and that the hearing denying plaintiffs restraining order was not a trial on the merits of the issue of default. Further, that this Court and the parties are bound by the decision of the Court of Appeals. Further, Proof of Service of the September 27, 1968 order and notice of hearing for same were not served in conformity with the Wayne Local Rules and the Praecipe for entry of said order was not filed until September 27, 1968, the day of entry, and said order was not approved as to substance or form by either plaintiff or her attorney.

3. Answering paragraph 3 plaintiff denies the allegations contained therein for the reason that same are not true. Further plaintiff states that she made many, several, and repeated attemps to peacefully resolve and avoid further problems with defendants and to avoid legal action.

4. Answering paragraph 4 plaintiff denies the allegations contained therein for the reason that same are not true. Further, plaintiff states that defendants have refused to give her an accounting or itemization to substantiate their publicized figures.

5. Answering paragraph 5 plaintiff denies the allegations contained therein for the reason that same are not true and plaintiff further states that " . . . all publications, communications and acts . . ." encompasses many communications

and acts not capable of conceivably being instituted or done in pursuance of the quoted statutes. Further, that as a general rule of law any "privileged" communication, or act is for the benefit of the client not the principal and further that plaintiff can find no privilege in the law relating to a financial institution client (customer) privilege.

6. Answering paragraph 6 plaintiff denies the allegations contained therein for the reason that same are not true.

7. Answering paragraph 7 plaintiff denies the allegations contained therein for the reason that same are not true. Further plaintiff states she believes the plain truth to be that there are no escrow requirements for conventional mortgages pursuant to said Rules and Regulations of the Federal Home Loan Bank Board.

8. Answering paragraph 8 plaintiff denies the allegations contained therein for the reason that same are not true. Further, plaintiff states the Court of Appeals in its decision of June 25th, 1971, determined this issue in favor of plaintiff and this Court and the parties are bound by that decision.

9. Answering paragraph 9 plaintiff denies the allegations contained therein for the reason that same are not true.

Wherefore, plaintiff prays that this Honorable Court grant judgment in favor of plaintiff as prayed for in plaintiffs second amended complaint, and that defendants affirmative defenses be dismissed with costs and attorney fees awarded to the plaintiff.

Counard & Kevelighan
By: /s/ Allen J. Counard

APPENDIX "Hc"

MOTION TO STRIKE PARAGRAPHS NUMBER 2 AND 8 OF DEFENDANTS AFFIRMATIVE DEFENSE

(State of Michigan--Circuit Court--County of Wayne--Filed August 16, 1971)

Now comes the plaintiff by and through her attorneys Counard and Kevelighan and moves this Honorable Court to Strike paragraph 2 and 8 of defendants Affirmative Defense pursuant to GCR 1963, Rule 115.2, for the following reasons:

1. That paragraphs 2 and 8 of Defendants Affirmative Defense is redundant and not drawn in conformity with these rules.

2. That the Court of Appeals in a decision rendered June 25th, 1971 decided these matters in favor of plaintiff, a copy of said decision is annexed hereto.

3. That by virtue of said Court of Appeals decision said paragraphs are immaterial.

Counard & Kevelighan
By: /s/ Allen J. Counard

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO STRIKE PARAGRAPHS NUMBER 2 AND 8 OF DEFENDANTS AFFIRMATIVE DEFENSE

(State of Michigan--Circuit Court--County of Wayne--Filed August 16, 1971)

MGCR 1963 Rule 115.2 reads as follows:

> Upon motion made by a party or upon the court's own initiative, the court may order stricken from any pleading any redundant, immaterial, impertinent,

scandalous, or indecent matter, or may order stricken any pleading or any part thereof not drawn in conformity to these rules.

The Court Order dated September 27, 1968, is not an adjudication of the issues regarding plaintiffs non-default or default but is merely the dissolution of a temporary restraining Order and in fact said Order is entitled "Order Dissolving Temporary Restraining Order". The Michigan Court of Appeals decision and the Michigan Supreme Court decision cited therein, Hopkins v Crantz (1952), 334 Mich 300, 303, hold quite clearly that the refusal of a temporary injunction does not affect a final decree. Further, the Proof of service of Notice of Hearing and Entry of Order filed for the September 27, 1968 Order was served by mail on September 23, 1968, according to the filed proof of service, and the praecipe was not filed until September 27, 1968.

The dissolution of a temporary order is not res judicata of the plaintiffs default. Only the Temporary order has been dissolved. Plaintiff is entitled to her day in Court on the issue of Wrongful foreclosure.

These issues were argued in the Court of Appeals and decided in favor of Plaintiff. The raising of these same issues in the affirmative defense is vexatious, harassing, and an unwarranted burden on the plaintiff.

We respectfully pray that this Honorable Court will Strike paragraph 2 and 8 of defendants affirmative defense.

Counard & Kevelighan
By: /s/ Allen J. Counard

APPENDIX "Hd"

ORDER GRANTING PLAINTIFFS MOTION TO STRIKE PARAGRAPHS NUMBER 2 AND 8 OF DEFENDANTS AFFIRMATIVE DEFENSES

(State of Michigan--Circuit Court--County of Wayne--Filed August 20, 1971)

At a session of said Court, held in the City-County Building, Two Woodward Avenue, Detroit, Michigan on the 20th Day of August, 1971.
Present: HONORABLE BENJAMIN J. BURDICK

Upon reading plaintiff's Motion to Strike paragraphs numbers two and eight of defendants affirmative defense, and the Court having heard oral argument by the attorneys for the parties in open Court, and the Court being fully advised in the premises, now therefore,

It is hereby ordered and adjudged that the word "adjudged" be stricken from aforesaid paragraph number two of defendants affirmative defense but that the balance of the allegation contained in paragraph two remain.

It is further ordered and adjudged that paragraph number eight of defendants affirmative defense be stricken from the pleadings in its entirety.

Benjamin J. Burdick
Wayne Circuit Judge

Notice of Entry Waived
/s/ William P. Thorpe
Attorney for Defendants

APPENDIX "I"

ORDER FOR SUMMARY JUDGMENT

(State of Michigan--Circuit Court--County of Wayne--Filed March 27, 1972)

At a session of said court held in the Old Recorders Court Building, City of Detroit, Wayne County, Michigan on March 27, 1972. Present: Honorable Richard L. Hammer.

Upon motion for Summary Judgment being made by both of the parties herein, by their respective attorneys, and the Court having examined the motions, briefs, records and files of the within cause, and pursuant to the opinion of the Court issued February 7, 1972, wherein the Court found that there was no genuine issue as to any material fact and that the Defendants were entitled to judgment as a matter of law, now therefore,

It is hereby ordered and adjudged that the Plaintiff, Virginia Cramer's, Motion for Summary Judgment be and the same is hereby denied;

It is further ordered and adjudged that the Defendants' Motion for Summary Judgment be and is hereby granted dismissing Plaintiff's Complaint with prejudice on the grounds that except as to the amount of damages there is no genuine issue as to any material fact and the Defendants are entitled to judgment as a matter of law;

It is further ordered and adjudged that Defendants are granted costs in the amount of Fifty Dollars ($50.00) dollars.

Richard L. Hammer
District Court Judge
Substituting in the
Wayne Circuit Court.

APPENDIX "J"

Decision of Court of Appeals,
(State of Michigan--Court of Appeals,
Division 1 -- May 29, 1973--Docket 14149)

Before: T. M. Burns, P.J., Adams, Bashara, JJ.
Per Curiam -- Unpublished.

Plaintiff appeals from the entry of summary judgment for defendant and the concomitant dismissal of her suit. Plaintiff's complaint stated six alleged causes of action against defendant: Count I -- breach of contract; Count II -- abuse of process; Count III -- libel and slander; Count IV -- breach of fiduciary duty; Count V -- invasion of privacy; and Count VI -- intentional infliction of emotional distress.

Plaintiff's suit centered upon the defendant's allegedly wrongful foreclosure on plaintiff's mortgage. The reason given by defendant for foreclosing by advertisement under authority of MCLA 600.3201; MSA 27A.3201 was that plaintiff had a deficiency in the escrow account which, according to the terms of the mortgage, she was required to pay into for future taxes and insurance.

Plaintiff moved for summary judgment, alleging that, even admitting deficiency, defendant had no legal right to foreclose. The trial court found that defendant did have a right to foreclose stating:

"The Court finds that the Defendant mortgagee did have a legal right to foreclose under the statute, and the Court will give its reasons as follows:

"1. The Escrow Clause, prepayment of funds for taxes, insurance, assessments, etc. was written into the Mortgage which Plaintiff signed.

"2. The provision has the status of a condition for Mortgage under the law.

"3. Plaintiff, by admission of both parties was deficient in the Escrow Fund payments at the date of foreclosure.

"4. The Power of Sale in the foreclosure clause is contained in the Mortgage as required by the statute."

The trial court denied plaintiff's motion and instead granted summary judgment for the defendants.

The parties to a mortgage agreement ~~may~~ MAY make any terms they wish a condition, the breach of which results in acceleration. The focal point is what the mortgage agreement provides. In Stewart v Eaton, 287 Mich 466, 481 (1939), the Michigan Supreme Court, speaking through Justice Potter stated:

"The statute of Michigan relating to the foreclosure of real estate mortgages by advertisement--and the validity of foreclosure sales under such statute depend upon the power contained in the mortgage giving to the mortgagee the right to foreclose the same * * *."

We have examined the mortgage agreement and we conclude that the trial court was correct in determining that defendant did have a legal right to foreclose. It necessarily follows that those causes of action dependent for their viability upon a finding that defendant had wrongfully foreclosed must be dismissed. Therefore, the trial judge was correct in granting

summary judgment in favor of the defendant as to Count I, II, III, VI, and VI.

However, plaintiff in Count IV of her complaint charges defendant with more than wrongful foreclosure. She in effect charges defendant with mishandling her funds in the escrow account for some time prior to the time immediately preceding foreclosure. She also charges defendant with breach of fiduciary duty in failing to pay her past taxes on time. These claims were not disposed of by the trial court's ruling that the defendant had legal right to foreclose. A fair reading of Count IV of plaintiff's complaint leads this Court to the conclusion that there is a genuine issue of fact to be decided by trial court.

We therefore, reverse and remand for trial with respect to Count IV of plaintiff's complaint. The trial court is affirmed in all other respects.

Affirmed in part and reversed in part.

APPENDIX "K"

Instructions to the Jury - August 27, 1973.

" * * * You should award each of the following elements of damage which you decide has been sustained by the plaintiff to the present time:

"One, any amounts of money received by the defendants from the plaintiff toward her escrow account that were not expended by the defendant for one of the purposes agreed upon between the parties;

"Two, if you find that a trust or fiduciary relationship existed between the plaintiff and the defendants, then the plaintiff would be entitled to any profit made by defendant through or arising out of the administration of the escrow account less the reasonable cost of maintaining the account.

"The second element of damage arises only if you find that there existed a trust or fiduciary relationship and if you find that the defendant breached that fiduciary relationship.

"For your purposes, a trust or a fiduciary relationship is one which arises as a result of a manifestation of an intention to create such a relationship by the parties that request the holder of the property in question, in this instance the defendants, to deal with the property for the benefit of another, in this case, the plaintiff. * * *

The Clerk: Has the jury reached a verdict?
The Foreman: Correct.
The Clerk: What is the verdict?
The Foreman: We find the defendant not guilty.
* * * "

JUDGMENT

(State of Michigan--Circuit Court--County of Wayne--Filed September 21, 1973)

At a session of the Circuit Court, held at the courthouse in the City of Detroit, County of Wayne, on the 21st day of September, 1973.
Present: Honorable John R. Kirwan,
Circuit Judge

The above-entitled action having come on

regularly for trial before a jury, the Plaintiff being present, and having called witnesses, adduced evidence and produced arguments in open court, and the jury having returned a verdict in favor of the Defendants, Metropolitan Federal Savings and Loan Association, a United States Corporation, James I. McClintock, Chairman of Board of Directors, Roger C. Richards, President, John C. Denyer, Assistant Vice-President, John Doe, Members of the Board of Directors, Richard Roe, Vice-President and all other officers of Metropolitan Federal Savings and Loan Association, and aginst the Plaintiff, Virginia Cramer, of no cause of action, now therefore.

It is hereby adjudged that a judgment of no cause of action be and the same is hereby entered against the Plaintiff, Virginia Cramer, and in favor of the Defendants, Metropolitan Federal Savings and Loan Association, a United States Corporation, James I. McClintock, Chairman of Board of Directors, Roger C. Richards, President, John C. Denyer, Assistant Vice-President, John Doe, Members of the Board of Directors, Richard Roe, Vice-President and all other officers of Metropolitan Federal Savings and Loan Association together with their costs herein to be taxed.

John R. Kirwan
Circuit Judge

APPENDIX "L"

OPINION - Docket 18948
(State of Michigan--Court of Appeals--Division 1)
Before: R B Burns, P.J., and T. M. Burns and
R. M. Maher, JJ.
Per Curiam -- Unpublished. June 2, 1975

Since the parties to this case are before this Court for a third time, a summary of the facts underlying the cause of action is necessary.

On July 29, 1963, plaintiff executed a note secured by a mortgage on her home in favor of the defendant, Metropolitan Savings and Loan Association (hereinafter Metropolitan). In 1968, a dispute arose regarding the amount required to be paid to Metropolitan under a provision in the mortgage requiring plaintiff to deposit monthly with the mortgagee, in escrow, funds to pay real property taxes and insurance.

After Metropolitan initiated foreclosure proceedings by advertisement, plaintiff commenced an action alleging that she had a defense to the foreclosure and that Metropolitan had demanded excessive escrow deposits and mishandled and failed to properly apply monies she had deposited in escrow. Plaintiff sought injunctive relief and money damages.

On September 28, 1968, the circuit court entered an order finding that since plaintiff was in default of her mortgage, Metropolitan could proceed with the foreclosure. On March 16, 1970, plaintiff sought to file an amended complaint and a demand for jury trial. Alleging that in June, 1969, she had exercised her right of redemption from the foreclosure sale, plaintiff claimed that due to the rise in interest rates since the time her original mortgage was executed in 1963, and because of other charges made by Metropolitan and expenses and damages incurred by her, she had been damaged by Metropolitan's wrongful foreclosure of the mortgage.

The circuit court entered an order denying plaintiff's request to file an amended complaint and denying her demand for a jury trial. The court subsequently entered a summary judgment on May 29, 1970, dismissing plaintiff's complaint on the ground that the 1968 finding that she was in default was res judicata. On appeal, this Court, in Cramer v Metropolitan Federal Savings & Loan Association, 34 Mich App 638, 641,642; 192 NW2d 50 (1971), reversed and remanded for further proceedings stating that plaintiff "was entitled to a full trial hearing on her claims that Metropolitan wrongfully foreclosed the mortgage and was guilty of other wrongdoing and that, in consequence, money damages should be awarded to her."

Pursuant to that decision, plaintiff filed an amended complaint in circuit court alleging six causes of action against Metropolitan. On March 27, 1972, the trial court granted summary judgment for the defendants on all six counts and dismissed plaintiff's suit with prejudice. Plaintiff appealed and this Court in Cramer v Metropolitan Federal Savings & Loan Association (Docket No. 14149, released May 29, 1973, an unpublished per curiam) affirmed summary judgment as to the five counts relating to the alleged wrongful foreclosure, but reversed as to the one count alleging breach of a fiduciary relationship, finding that as to this count there was a genuine issue of fact to be decided by the trial court.

Upon this second remand, the trial court limited the jury trial to the issue of the alleged breach of a fiduciary relationship. In its charge to the jury, the trial court instructed the jury to determine from the facts whether a fiduciary relationship existed between defend-

ant and plaintiff, and if so, whether defendant breached that fiduciary relationship. After these instructions, to which plaintiff expressed complete satisfaction, the jury retired and subsequently returned a verdict of no cause of action on August 27, 1973. On September 21, 1973, judgment was entered upon the verdict. This appeal followed.

Plaintiff first claims that the trial court erred reversibly when it failed to submit the question of wrongful foreclosure to the jury. We disagree. As we mentioned earlier, plaintiff brought six counts in her second amended complaint, five of which related to defendant's alleged wrongful foreclosure on plaintiff's mortgage. In the aforementioned unpublished per curiam, this Court held that summary judgment on those five counts was proper when it stated:

"We have examined the mortgage agreement and we conclude that the trial court was correct in determining that defendant did have a legal right to foreclose. It necessarily follows that those causes of action dependent for their viability upon a finding that defendant had wrongfully foreclosed must be dismissed. Therefore, the trial judge was correct in granting summary judgment in favor of the defendant as to Count I, II, III, V and VI."

Therefore, since this Court has already decided the exact issue here, there was no error committed by the trial court in refusing to allow evidence to be presented on the issue of wrongful foreclosure by defendant.

Plaintiff's second and final allegation of error in that the trial court erred reversibly when it instructed the jury that they must

decide whether a fiduciary relationship existed between the parties. Plaintiff contends that the question of whether a fiduciary relationship exists is a question of law to be decided by the court, and that it was therefore error to submit that issue to the jury.

No objection was made by the plaintiff to the trial court's instructions. Failure to object to the trial court's instructions usually precludes appellate review. Price v Manistique Schools, 54 Mich App 127, 131; 220 NW2d 325 (1973); Veal v Spencer, 53 Mich App 560, 564; 220 NW2d 158 (1974). However, in order to prevent manifest injustice, our Courts will review instructions which allegedly err with respect to basic and controlling issues in a case even though an objection was not made. Smith-Douglas v Walch, 391 Mich 201, 204; 215 NW2d 142 (1974). With this in mind, we now address our attention to plaintiff's claim that the defendant occupies a fiduciary relationship as a matter of law.

It is the general rule in this State that the existence of a fiduciary relationship is a question of fact. Totorean v Samuels, 52 Mich App 14, 17; 216 NW2d 429 (1974); Taylor v Klahm, 40 Mich App 255, 264; 198 NW2d 715 (1972). A fiduciary relationship exists only "when there is a reposing of faith, confidence and trust and the placing of reliance by one upon the judgment and advice of another." Williams v Griffin, 35 Mich App 179, 183; 192 NW2d 283, 285 (1971); Mannausa v Mannausa, 370 Mich 180, 184; 121 NW2d 423, 425 (1963); In re Jennings' Estate, 335 Mich 241, 244; 55 NW2d 812, 813 (1952). In view of the broad definition of the term "fiduciary relationship" as set forth above, and in light of the evidence presented concerning the relationship which existed between

plaintiff and defendant Metropolitan in the case at bar, the trial court did not err in permitting the jury to determine the question as to the existence of a fiduciary relationship.

Affirmed.

APPENDIX "La"

APPLICATION FOR LEAVE TO APPEAL FROM DECISIONS OF COURT OF APPEALS

(State of Michigan--The Supreme Court--
June 21, 1975)

Plaintiff-appellant, Virginia Cramer, in propria persona, says:

1. Virginia Cramer, Plaintiff-appellant, applies for leave to appeal from decisions entered in the Court of Appeals on June 2, 1975, (unpublished Docket 18948), May 29, 1973, (unpublished Docket 14149) and Cramer v Metropolitan Federal Savings & Loan, et al, (published Docket 9619) 34 Mich App 638, 192 NW2d 50 (1971) pursuant to MGCR 853, for the following reasons:

(a) The subject matter of the appeal involves legal principles of major significance to the jurisprudence of the State and involves a substantial question as to the applicability of MSA 27A.3201, 3204; RJA 600.3201, 600.3204, and the validity of a mortgage foreclosure pursuant to such statute. The said statute is entitled:

"Foreclosure of mortgages containing power of sale; right

"Sec. 3201 Every mortgage of real estate,

containing therein a power of sale, upon default being made in any condition of such mortgage, may be foreclosed by advertisement, in the cases and in the manner hereinafter specified. P.A. 1961, No. 236, Sec. 3201, Eff. Jan. 1, 1963.

"Sec. 3204 Same; prerequisites; installments as separate mortgages; redemption

"Sec. 3204 To entitle any party to give a notice as hereinafter prescribed, and to make such foreclosure, it shall be requisite:

(1) That some default in a condition of such mortgage shall have occurred, by which the power to sell became operative;
(2) That no suit or proceeding shall have been instituted, at law, to recover the debt then remaining secured by such mortgage, or any part thereof; or if any suit or proceeding has been instituted, that the same has been discontinued, or that an execution upon the judgment rendered therein has been returned unsatisfied, in whole or in part; * * * "
P.A. 1961, No. 236, Sec. 3204, Eff. Jan. 1, 1963.

2. The subject matter of the appeal has significant interest, involves a suit brought against Metropolitan Savings and Loan, a chartered lending institution, the founder and Chairman of the Board of Directors of which is an attorney at law and past-president and member of the bar association in Michigan. The described case involves:

(a) the limited vested rights of the mortgagee-escrow-holder which only entitle him to insure the proper disposition of funds "held" in escrow.

(b) the rights of the parties to the funds, so-called "held" in escrow and the effect of any failure to comply with the conditions of the escrow agreement as specified in the mortgage contract

(c) Utilization of escrow funds by the mortgagee-escrow-holder contrary to the specific terms of the escrow clause contained in the express agreement of the mortgage contract

(i) failure of mortgagee-escrow-holder to pay taxes when due from escrow monies deposited by mortgagor

(ii) mortgagors' escrow-monies invested by mortgagee-escrow-holder and profitting, whereas the mortgage contract specifies that such escrow monies are "to be held by mortgagee, without interest thereon, to pay said taxes, assessments and premiums when due."

(iii) mortgagor's escrow monies disbursed by mortgagee-escrow-holder for mortgage insurance, whereas said mortgage covenant and agreement is absent of any language as to "mortgage insurance"

(iv) failure of mortgagee-escrow-holder to account for demands of excessive escrow and foreclosure by publication upon mortgage principal and undisbursed escrow monies

(v) mortgagee's foreclosure upon mortgage principal and property-tax liabilities not yet due, and said mortgagee had not expended its monies for benefit of said mortgagor

(vi) inter alia

(d) whether there existed a "fiduciary relationship" between the mortgagor-escrow-depositor and the mortgagee-escrow-holder-disburser, and whereas said mortgagee-escrow-holder-disburser exercised his influence unduly resulting in the existence of said "fiduciary relationship" as a matter of law, rather than a question of fact, where confidence has been reposed and betrayed.

(e) an express mortgage covenant and agreement between mortgagor and mortgagee, containing power of sale, "pursuant to the statute in such case made and provided, * * * "

(f) inter alia

3. The decisions of the Court of Appeals are clearly erroneous and has caused material injustice, as follows:

In 34 Mich App 638, 192 NW2d 50 (1971) (Docket 9619) quote:

"A dispute arose concerning the amount required to be paid to Metropolitan Federal under a provision in the mortgage obligating Mrs. Cramer to deposit monthly with the mortgagee, in escrow, sums to pay real property taxes and hazard and <u>mortgage insurance premiums</u>. Id 640 (emphasis supplied) * * * Mrs. Cramer's evidence was not heard. * * * " Id 641.

(a) There is no provision in said mortgage contract for mortgage insurance. The decision of the Court of Appeals is clearly erroneous.

(b) In testimony, the Defendants-mortgagee admit "mortgage insurance is not in the contract" and further Defendants-mortgagee admit $180.00 was disbursed from Mrs. Cramer's escrow monies, by the Defendants-mortgagee, in the absence of said provision in said mortgage contract.

(c) The trial court has refused to hear the matter of wrongful foreclosure, inter alia. Mrs. Cramer's evidence has never been heard.

(d) The Court of Appeals has the power and the duty to correct its own errors, but refuses and neglects to do so.

4. The decisions of the Wayne Circuit Court are clearly erroneous and has caused material injustice and will cause manifest injustice, as follows:

(a) That the mortgage contract created a "fiduciary relationship" as a matter of law.

(b) That the mortgagee assumed a position, relationship or status upon which the general law predicates a duty independent of the terms of the contract; that said duty, at common law, is to act in good faith and with diligence in protecting the interests of the mortgagor.

(c) That mortgagee is subject to such obligations of good faith and diligence as are imposed on mortgagees with power of sale in states permitting that form of foreclosure.

(d) The Wayne Circuit Court has barred the plaintiff-mortgagor from giving testimony or evidence as to matters relating to the foreclosure.

(e) The Court of Appeals, 34 Mich App 638, Docket 9619, said:

> "The dissolution of temporary restraining order in the present case did not end Mrs. Cramer's action which sought money damages as well as injunctive relief. She was entitled to a full trial hearing on her claims that Metropolitan Federal wrongfully foreclosed the mortgage and was guilty of other wrong doing and that, in consequence money damages should be awarded to her."

(f) The trial court has refused to hear the matter of wrongful foreclosure.

(g) The trial court's instruction to the jury was reversible error, even though no objections were made, either by Plaintiff or Defendant, in permitting the jury to determine the question as to the existence of a fiduciary relationship.

(h) The Michigan Court of Appeals, likewise, by affirming, has erred reversibly, and its decision is in conflict with decisions of the Supreme Court of Michigan, i.e. in Potter v Lindsay, 337 Mich 404, 60 NW2d 133 (1953) and In re Wood Estate (1965) 374 Mich 278, 132 NW2d 35.

(i) The court's system is oppressive, repressive and suppressive, and promotes injustice against those injured and victimized, and operates solely for the benefit of the bullies, despots and tyrants of the legal profession.

This application for leave to appeal is based upon the apparent neglect of duty by the Court of Appeals to correct its own errors.

Attached hereto are copies of said decisions of the Michigan Court of Appeals, entered in the above-entitled case, as follows:

1971 - 34 Mich App 638 - Docket 9619, published
1973 - Docket 14149 (unpublished) May 29, 1973
1975 - Docket 18948 (unpublished) June 2, 1975

and the Opinion of visiting Judge Richard Hammer made a part of the Michigan Court of Appeals opinion, Docket 14149, made a part hereof by reference, and a concise statement of the proceedings and facts so far as they are material, and the Affidavit of Virginia Cramer attached hereto and made a part hereof.

/s/ Virginia Cramer
Plaintiff in pro per

June 21, 1975

APPENDIX "Lb"

ORDER GRANTING LEAVE TO APPEAL

(State of Michigan--Supreme Court--
September 11, 1975)

Present the Honorable Thomas Giles Kavanagh, Chief Justice, John B.Swainson, G. Mennen Williams, Charles L. Levin, Mary S. Coleman, John W. Fitzgerald, Lawrence B. Lindemer Associate Justices

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court

Room, in the City of Lansing, on the 9th day of September in the year of our Lord one thousand nine hundred and seventy-five.

On order of the Court, the application by plaintiff and appellant for leave to appeal is considered, and the same hereby is Granted, limited to the issues raised in appellant's application.

Swainson, J., not participating.

State of Michigan--ss. * * * "

APPENDIX "M"

Certified copies of Appellant's "Brief on Appeal
Certified copies of Volumes I and II, Record on Appeal

Certified copies of Appellant's "Application for Rehearing"

(Forwarded by the Michigan Supreme Court Clerk to the Supreme Court of the United States)

APPENDIX "N"

Michigan Supreme Court
Cramer v Metropolitan Savings & Loan Association
Docket No. 57215. Argued October 7, 1976
(Calendar No. 18) --Decided October 6, 1977.

Virginia Cramer brought an action to enjoin foreclosure of a mortgage and for damages against Metropolitan Savings and Loan Association and its officers, alleging excessive escrow demands and mishandling of the escrow funds as a defense to the foreclosure. The Wayne Circuit Court, Thomas J. Murphy, J., granted judgment for the defendants on a finding that the plaintiff was in default. Plaintiff's motion to file an amended complaint was denied and Edward F. Bell, J., granted the defendants summary judgment on the ground of res judicata. The Court of Appeals, Danhof, P.J., and McGregor and Levin, JJ., reversed in a per curiam decision (Docket No. 9619), 34 Mich App 638; 192 NW2d 50 (1971). Plaintiff filed an amended complaint of six counts which alleged wrongful foreclosure, and other wrongdoing, and Richard L. Hamner, J., granted summary judgment for Metropolitan. The Court of Appeals, T.M. Burns, P.J., and Adams and Bashara, JJ., affirmed as to five counts, but reversed as to the count alleging breach of a fiduciary relationship (Docket No. 14149). A jury in Circuit Court, John R. Kirwan, J., found no cause of action against the defendants on the allegation of a breach of a fiduciary duty. The Court of Appeals, R.B. Burns, P.J., and T.M. Burns and R.M. Maher, JJ., affirmed (Docket No. 18948). The plaintiff appeals. Held:

1. The existence of a statute which permits a mortgagee to foreclose a mortgage by advertisement rather than by judicial process does not constitute state action under the Equal Protection Clauses of the Michigan and Federal Constitutions. Since the power of sale is an incident of the private right to contract, a mortgagee who exercises a foreclosure option is relying on a contract remedy, and not on a right created by statute.

2. The remedy for breach of a covenant is damages or an injunction, whereas the remedy for default on a condition subsequent is termination of the contract. The question whether a particular provision in a contract is a condition or a covenant depends in large part on the language of the contract, interpreted with the intent of the parties as the paramount consideration. Under the terms of the mortgage in the instant case, plaintiff failed to perform a covenant to pay monies into escrow, the performance of which was a condition of the contract. The remedy authorized by the mortgage was termination by foreclosure of the mortgage. This case does not involve a mere technical breach of the contract by the mortgagor, but a refusal to make the payments as agreed.

Affirmed.

1. MORTGAGES--FORECLOSURE--POWER OF SALE--CONSTITUTIONAL LAW

The power of sale is an incident of the private right to contract; therefore a mortgagee who exercises a power of sale in the mortgage to foreclose by advertisement is relying on a contract remedy, and not a right created by statute (MCL 600.3201 et seq; MSA 27A.3201 et seq.).

2. MORTGAGES--FORECLOSURE--CONSTITUTIONAL LAW--DUE PROCESS

The existence of a statute which permits a mortgagee to foreclose by advertisement rather than by judicial process does not constitute state action in violation of the Due Process Clauses of the State and Federal Constitutions (US Const, Am XIV; Const 1963, art 1, Sec 17).

3. CONTRACTS--WORDS AND PHRASES--COVENANTS--CONDITIONS

A covenant is commonly regarded as an assurance that something will be done in the future, while a condition is a cause of some change in a legal relationship; whether a particular provision of a contract is a covenant or a condition depends in large part on the language of the contract, interpreted with the intent of the parties as the paramount consideration.

4. CONTRACTS--REMEDIES--COVENANT--CONDITION SUBSEQUENT

The remedy for breach of a covenant is damages or an injunction, whereas the remedy for default on a condition subsequent is termination of the contract.

5. MORTGAGES--FORECLOSURE--TAXES--ESCROW PAYMENTS--DEFAULT

A mortgagor breached a covenant the performance of which was a condition under the terms of the mortgage by refusing to pay monies into escrow for property taxes and insurance; therefore foreclosure of the mortgage by advertisement was proper where the mortgage agreement provided that that would be the remedy for default in performance of a

covenant by the mortgagor (MCL 600.3201 et seq.; MSA 27A.3201 et seq.).

References for Points in Headnotes

(1) 55 Am Jur 2d, Mortgages at 716, 717.
(2) 55 Am Jur 2d, Mortgages at 716.
(3) 20 Am Jur 2d, Covenants, Conditions, and Restrictions at 1, 19.
(4) 20 Am Jur 2d, Covenants, Conditions, and Restrictions at 184, 314.
(5) 55 Am Jur 2d, Mortgages at 296.

Virginia Cramer in propria persona.

McClintock, Donovan, Carson & Roach for defendants.

KAVANAGH, C.J. This appeal arises out of a mortgage foreclosure on plaintiff's property by defendant after the latter accelerated the debt because of an alleged deficiency in plaintiff's "escrow" account. The parties have been before the Court of Appeals in this matter on three occasions, the last appeal to the Court resulting in an affirmance of a jury's verdict for defendant on a breach of fiduciary duty count brought by plaintiff.

This Court granted leave to consider plaintiff's allegations of error in all of the proceedings below.

In June, 1963, plaintiff executed a mortgage application to defendant Metropolitan Savings and Loan Association (hereinafter "Metropolitan") which then issued a "commitment letter", dated July 3, 1963, setting forth the conditions of the loan.

Pursuant to the commitment, plaintiff executed a promissory note secured by a mortgage delivered to defendant on July 29, 1963.

The mortgage included the following terms:

"Mortgagor covenants and agrees:

* * *

"2. In order more fully to protect the security of this mortgage, in addition to the monthly installments of principal and interest, to pay to mortgagee an installment of the taxes and assessments levied or to be levied against said premises that will next become due, (and) an installment of the premium or premiums that will next become due to renew the insurance on said premises (as hereinafter provided) * * *. The said installments shall be equal, respectively, to the taxes and assessments next due and the premium or premiums for such insurance, as estimated by mortgagee, less all sums already paid therefor, divided by the number of months to elapse before one month prior to the date when such taxes, assessments and premiums will become due, such sums to be held by mortgagee, without interest thereon, to pay said taxes, assessments and premiums when due. All payments for principal, interest, taxes, assessments and premiums shall be added together and the aggregate amount thereof shall be paid by mortgagor to mortgagee each month in a single payment. If the sum so deposited shall not be sufficient to pay the taxes, assessments and premiums when the same become due, mortgagor agrees to forthwith pay to mortgagee the amount of the deficiency, and if said deposits shall exceed the amount actually paid by mortgagee therefore, the excess shall be credited upon principal.

* * *

"8. In the event of default in the payment of said indebtedness, or any part thereof, or in the performance of any of the covenants or conditions hereof, mortgagee may, without

notice, at its option, declare the entire indebtedness secured hereby due, then or thereafter, as it may elect, regardless of the date of maturity and is hereby authorized and empowered to sell or cause to be sold said premises, pursuant to the statute in such case made and provided, and out of the proceeds of the sale to retain the sums then due hereunder, and all costs and charges of the sale (including the attorneys' fee provided by statute), rendering any surplus moneys to mortgagor. The commencement of proceedings to foreclose this mortgage in any manner authorized by law shall be deemed an exercise of the above option."

The parties also executed a "Loan Settlement Statement", which itemized the monthly payments as follows:

Principal and Interest	$103.81
Tax Escrow	22.25
Insurance Escrow	4.00
MGIC (Mortgage Guaranty Insurance Company) Premium	3.44
	$133.50

The mortgage note, in the amount of $16,500, provided for a monthly payment of $103.81, constituting principal and interest, and made no mention of any other amount for escrow or mortgage insurance premium.

For a period of time, plaintiff made timely payments, including escrow, and in fact, was well ahead of her repayment schedule for principal. There was a continuing dispute, however, over the escrow account, with plaintiff alleging that defendant had not paid her taxes and escrow premiums when due and that defendant was requiring excessive escrow payments.

Defendant admits that it allowed plaintiff's 1963-1964 taxes to become delinquent, but in 1965 paid the back taxes, including all penalties. Plaintiff finally stopped the escrow payments, and stated that she wished to make her tax and insurance payments directly. Plaintiff admits in her brief that she did not maintain a current escrow account.

On May 23, 1968, defendant instituted foreclosure proceedings by advertisement pursuant to MCLA 600.3201 et seq.; MSA 27A.3201 et seq., and paragraph 8 of the mortgage agreement. Defendants complied in all respects with the requirements of the statute.

Plaintiff obtained a temporary restraining order, which was subsequently dissolved after the court determined that plaintiff was in default of her mortgage. The property was sold at a sheriff's sale on October 1, 1968 and plaintiff redeemed the property on June 5, 1969.

Following several judicial proceedings, including an appeal to the Court of Appeals, (34 Mich App 638; 192 NW2d 50 (1971), plaintiff was allowed to file an amended complaint, which alleged breach of contract, abuse of process, libel, breach of fiduciary duty, invasion of privacy, and intentional infliction of emotional distress. Summary judgment was granted for defendant on March 27, 1972.

In an unpublished per curiam opinion (Docket No. 14149, released May 29, 1973), the Court of Appeals affirmed on all counts except that charging breach of fiduciary duty, which was remanded for trial. The subsequent jury trial on that issue resulted in a verdict for defendants, and judgment was entered September 21, 1973.

The Court of Appeals affirmed on June 2, 1975.

I

The appeal raises two questions which merit discussion. First, plaintiff questions the constitutionality of the Michigan foreclosure by advertisement statute, which provides in part:

"Every mortgage of real estate, containing therein a power of sale, upon default being made in any condition of such mortgage, may be foreclosed by advertisement, in the cases and in the manner hereinafter specified."
MCLA 600.3201, MSA 27A.3201.

"To entitle any party to give a notice as hereinafter prescribed, and to make such foreclosure, it shall be requisite:

"(1) That some default in a condition of such mortgage shall have occurred, by which the power to sell became operative * * * "
MCLA 600.3204, MSA 27A.3204.

The essence of plaintiff's constitutional argument is that the foreclosure statute grants a mortgagee the power to terminate a mortgage relationship by use of procedures that are not in harmony with the requirements of the Fourteenth Amendment to the United States Constitution and article 1, sec. 17 of the Michigan Constitution. Specifically, she claims that the Michigan foreclosure by advertisement statute, as applied, violated the due process clauses of the two constitutions in that it requires neither a notice of hearing, nor a hearing to establish the debt.

Plaintiff's argument rests upon the United States District Court's decision in Northrip v Federal National Mortgage Ass'n, 372 F Supp 594 (ED Mich, 1974).

There the court acknowledged that a due pro-

cess question is raised only where there is state action, the test for which is whether or not the state has significantly involved itself in the challenged conduct. The Northrip court held that state action was present because the "statute encourages mortgagees to seek foreclosure by advertisement, rather than by judicial process * * * " . 372 F Supp 597.

The district court also ruled that while a power of sale may be deemed to waive the right to a due process hearing before foreclosure by advertisement, there was no such waiver in the case before it. The plaintiff had not "voluntarily, intelligently and knowingly" waived her due process rights because the power of sale did not include any terms of waiver, nor did it notify plaintiff of the procedure to be utilized in foreclosing upon her property.

The district court ultimately held that the statute, as applied, did not satisfy minimum due process requirements "because the process failed to provided an adequate opportunity to be heard before the taking of a significant property interest". 372 F Supp 599.

Plaintiff in her brief fails to note, however, that the lower court decision in Northrip was subsequently reversed. The Sixth Circuit Court of Appeals disavowed the state action analysis employed and the result reached by the district court. 527 F2d 23 (CA 6, 1975).

The Federal appellate court held that the existence of a statute which permitted a mortgagee to foreclose by advertisement rather than by judicial process did not constitute state action.

Since "the power of sale is an incident of the private right to contract. Equitable Trust Co v Barlum Realty Co, 294 Mich 167; 292 NW 691 (1940)", a mortgagee who exercises a foreclosure option is relying on a contract remedy,

and not on a right created by the statute. 527 F2d 26-27. Therefore, the state cannot be said to be significantly involved, through "encouragement", in the challenged conduct, and a due process question is consequently not presented.

Our own Court of Appeals in National Airport Corp v Wayne Bank, 73 Mich App 572; 252 NW2d 519 (1977), has recently adopted the Sixth Circuit's full and definitive analysis of the Michigan foreclosure by advertisement statute. We do likewise.

Accordingly, we hold that the plaintiff's instant claim of unconstitutionality under both the Michigan and Federal Constitutions fails for lack of the existence of state action.

II

We next consider whether or not plaintiff's refusal to make timely escrow payments for taxes and insurance constituted a "default * * * in any condition of (the) mortgage", allowing foreclosure by advertisement pursuant to MCLA 600. 3201; MSA 27A.3201.

The mortgage provides that:

"Mortgagor covenants and agrees:

"2. In order more fully to protect the security of this mortgage, in addition to the monthly installments of principal and interest, to pay to mortgagee an installment of the taxes and assessments levied or to be levied against said premises that will next become due, (and) an installment of the premium or premiums that will next become due to renew the insurance on said premises * * * ."

Paragraph 8 of the mortgage further provides

that in the event of default "in the performance of any of the covenants or conditions hereof", mortgagee may accelerate the full indebtedness and sell the property pursuant to the statute.

It is plaintiff's argument that the above provisions in the mortgage constitute a covenant, the remedy for breach of which is an action for damages or an injunction.

Defendants, on the other hand, contend that paragraphs 2 and 8, when read together, make monthly payments into escrow a condition, and default thereon allows foreclosure by advertisement.

Commonly, a covenant is regarded as an assurance that something will be done in the future, while a condition is regarded as "a fact or event that affects legal relations; it is a cause of some change in those legal relations". 3A Corbin, Contracts, at 627, 633. The remedy for breach of a covenant is damages or an injunction, whereas the remedy for default on a condition subsequent is termination of the contract. Capitol Land Co v Zorn, 134 Ind App 431, 443; 184 NE2d 152, 158 (1962); 17A CJS, Contracts, at 339, 399.

The question whether a particular provision in a contract is a covenant or, alternatively, a condition, does not admit of an absolute answer. Rather, the resolution of the issue depends in large part on the contract, with the intent of the parties being the paramount consideration. McIntosh v Groomes, 227 Mich 215; 198 NW 954 (1924).

Recognizing the parties' prerogative to provide for their own contract, we said in White v Burkhardt, 338 Mich 235, 239; 60 NW2d 925 (1953):

"Foreclosure of mortgages by advertisement and sale has been in use in this State for about 100 years, and is well understood. Such statutory foreclosures should not be set aside without some good reason therefor. Markoff v Tournier, 229 Mich 571 (201 NW 888 (1925)), and Detroit Trust Co v Agozzinio, 280 Mich 402, 496 (273 NW 747 (1937)). Statutory foreclosures are a matter of contract, authorized by the mortgagor, and ought not to be hampered by an unreasonably strict construction of the law. Lee v Clary, 38 Mich 223 (1978), and Peterson v Jacobs, 303 Mich 329, 335 (6 NW2d 533 (1942))."

We are convinced that under the terms of the contract before us, plaintiff has defaulted on a condition. By refusing to pay monies into escrow, plaintiff failed to perform a covenant the performance of which was a condition of the contract. 3A Corbin, supra, at 633, 635. Plaintiff agreed that Metropolitan would have the option of foreclosing pursuant to the statute if she did not perform her covenant. The remedy is concededly a harsh one, but "harshness or hardship alone will not defeat a foreclosure". Schechtman v Grobbel, 226 So 2d 1, 3 (Fla Dist Ct App, 1969).

Despite plaintiff's insistence to the contrary, this case does not involve a mere technical breach by the mortgagor as was present in Schechtman, supra. In that case the Florida District Court of Appeals refused to allow foreclosure where the mortgagor paid escrow monies to a bank rather than to the mortgagee, as required by the mortgage. The court emphasized that, even though the payment was made to the wrong institution, the escrow balance was at all times current and the security of the mortgage was never in jeopardy. Here plaintiff refused

to make the payments.

We agree with the trial court and the Court of Appeals that the foreclosure was licit.

Affirmed. Costs to defendant.

Williams, Levin, Coleman, Fitzgerald, and Ryan, JJ., concurred with Kavanagh, C.J.

Blair Moody, Jr., J., took no part in the decision of this case.

APPENDIX "O"

ORDER DENYING REHEARING

At a session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room in the City of Lansing, on the 15th day of December in the year of our Lord one thousand nine hundred and seventy-seven.

Rehearing No. 436

Present the Honorable Thomas Giles Kavanagh, Chief Justice, G. Mennen Williams, Charles L. Levin, Mary S. Coleman, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices

In this cause an application for rehearing is considered and is hereby DENIED.

Plaintiff-Appellant's motion to expand record to include exhibits pertaining to the application for rehearing is also considered and is hereby DENIED for the reason that no adequate cause has been shown for the granting of such relief.

State of Michigan--ss. * * * "

APPENDIX "P"

Oral Argument Requested -- Docket 57215
Motion for Emergency and Immediate Consideration of Attached Motion for Stay of Proceedings in Publication of Decision Pending Review on Certiorari in the U. S. Supreme Court -- Filed December 22, 1977

Plaintiff-appellant, Virginia Cramer in pro per, in the above-entitled matter moves the court for EMERGENCY and IMMEDIATE consideration as to the attached motion for stay of proceedings in publication of decision pending review on certiorari to the U. S. Supreme Court, as follows:

1. That the decision is dishonest.
2. That said decision is insane.
3. That said decision is amoral.
4. That said decision is wrong and erroneous and false.
5. That your plaintiff-appellant intends to file a petition for certiorari in the U. S. Supreme Court and will also seek relief in the U. S. Supreme Court under their power of supervision of state courts.

/s/ Virginia Cramer
Plaintiff-appellant
In Propria Persona

December 22, 1977

MOTION FOR STAY

Plaintiff-appellant, Virginia Cramer in pro per, in the above-captioned matter moves the court for STAY OF PROCEEDINGS IN PUBLICATION OF DECISION pending Review on Certiorari to the U. S. Supreme Court for the following reasons:

1. That the decision of October 6, 1977, contains erroneous statements of the court which are not supported in the record.

2. That the decision of October 6, 1977, contains erroneous procedural interpretations which are contrary to the actual procedures having occurred in the lower court.

3. That the defendants-appellees do not oppose plaintiff-appellant's statements and facts presented that she was not in default of the conditions of the mortgage contract.

4. That the plaintiff-appellant never failed to perform a covenant to pay monies into escrow until after the defendants Metropolitan Savings and Loan had instituted foreclosure by advertisement proceedings.

5. That the Michigan State courts including the Michigan Supreme Court have denied plaintiff-appellant due process of law.

6. That applications for Stay pending review on Certiorari to a justice of the U. S. Supreme Court will normally not be entertained unless application for a stay has been first made to a judge of the court rendering the decision sought to be reviewed.

7. That the decision of the Michigan Supreme Court is entirely erroneous in that it condones and encourages a mortgagee's misconduct, mishandling of escrow funds, failure to pay taxes timely with mortgagor's escrow monies, misuse of escrow funds, violation of terms of covenant and agreement by mortgagee, embezzlement and swindling of mortgagor's escrow funds by mortgagee, and the failure of mortgagee to perform conditions subsequent to receiving payments of escrow from a mortgagor as agreed under the provisions of the mortgage contract.

8. That said decision of October 6, 1977, as rendered by said Michigan Supreme Court, is dishonest and lacking in integrity, and is

contrary to law and contrary to all well established rules of law.

WHEREFORE your Plaintiff-appellant demands that this court issue an Order of Stay of proceedings in publication of said decision of October 6, 1977, pending Review on Certiorari to the U. S. Supreme Court. ORAL ARGUMENT REQUESTED

/s/ Virginia Cramer, In Pro Per
Plaintiff-appellant

State of Michigan)
County of Wayne) SS. AFFIDAVIT IN SUPPORT OF MOTION FOR STAY

Virginia Cramer, plaintiff-appellant in pro per, being first duly sworn deposes and makes this affidavit in support of her Motion for Stay of proceedings in publication of decision pending review on certiorari to the United States Supreme Court, as follows:

1. That she is the plaintiff-appellant in the above-entitled action;

2. That she had researched the law and prepared her own brief on appeal submitted to the Michigan Supreme Court under date of March 26, 1976.

3. That nothing is contained in her brief as to the words on page 3 of the said court's decision "Plaintiff admits in her brief that she did not maintain a current escrow account" and that said words in said court's decision are erroneous.

4. That the following words of said court's decision on page 3 are erroneous "Defendants complied in all respects with the requirements of the statute" for the reason that the statute calls for a "default in a condition of the mortgage" by a mortgagor and that your plain-

tiff-appellant as mortgagor was not in default of any condition of said mortgage.

5. That further on page 3 of said decision, the words "after the court determined that plaintiff was in default of her mortgage" are erroneous for the reason that no proper hearing on said alleged "default" was had and your plaintiff appellant was not permitted to offer her proofs, evidence and testimony that she was not in default of said mortgagor conditions or provisions.

6. That an "Order Dissolving a Temporary Restraining Order" is not a judgment by the court and there were no findings of fact and plaintiff appellant was not permitted to offer any facts or anything else.

7. That the Michigan Court of Appeals (34 Mich App 638; 192 NW 2d 50 (1971) stated in said opinion "Mrs. Cramer's evidence was not heard." which is a denial of due process.

8. Plaintiff-appellant motioned for Summary Judgment, but instead, summary judgment was granted for Defendant on March 27, 1972, even though said Defendants had not motioned said court for said summary judgment.

9. Plaintiff-appellant's evidence and testimony as to wrongful foreclosure was not permitted to be heard during the subsequent jury trial for the reason that plaintiff-appellant was limited to only Count IV of her complaint charging defendants with breach of fiduciary duty, and plaintiff-appellant's testimony and evidence as to wrongful foreclosure was prevented and prohibited by the court and counsel for defendants.

10. That the "due process" question is raised by the very fact that your Plaintiff-appellant has never been heard as to the wrongful foreclosure wherein your plaintiff-appellant, as mortgagor, was not in default of said mortgage, and

that said court's process failed to provide an adequate opportunity to be heard before the Sheriff's sale of said property and the anticipated stealing of a property, when said mortgagor was not in default on any conditions of said mortgage.

11. That the testimony of defendant, John C. Denyer, on September 6, 1968, did not establish any debt or indebtedness to permit the defendants to proceed with the foreclosure.

12. That on page 5 of said decision of the Michigan Supreme Court, the court erroneously holds that "lack of the existence of state action" namely, no proper hearing and that Mrs. Cramer's evidence has never been heard is not unconstitutional for the reason that Mrs. Cramer's evidence has never been heard.

13. That the record shows that plaintiff made escrow payments to mortgagee-defendants each and every month without fail, and in addition to the monthly installments of escrow payments she paid other escrow monies to said mortgagee for taxes and insurance, and that the court has erroneously stated at the top of page 6, of said decision of October 6, 1977, "plaintiff's refusal to make timely escrow payments" which is not supported in the record, but to the contrary the record shows that plaintiff made timely escrow payments for taxes and insurance each and every month without fail.

14. That after plaintiff had made timely escrow payments for taxes and insurance each and every month without fail, the said defendants-mortgagee failed to pay mortgagor's taxes and insurance timely, which said mortgagee admitted while said escrow monies are invested in short-term loans to others and said mortgagee is self-dealing and profitting with said escrow funds of mortgagors whereas the mortgage contract provides "to be held by mortgagee without

interest thereon, to pay said taxes, assessments and premiums when due" as to said escrow funds.

15. That the defendants-mortgagee required excessive escrow monies, computed contrary to the language and terms and conditions of the mortgage contract, and foreclosed by advertisement on said excessive escrow "moneys" during which time your plaintiff-appellant (mortgagor) was not in default of said mortgage contract and no taxes and no insurance payments were due, and none were unpaid.

16. That the said escrow "moneys" foreclosed upon by advertisement were published in the "Notice of Mortgage Sale" as $12,519.37 on May 23, 1968, when the next tax assessment as billed was only $101.33 for July 1968, and the subsequent tax assessment for December 1968 was $491.09.

17. That the said defendants-mortgagee accelerated and foreclosed by advertisement for future taxes not yet assessed and not billed and which was not a debt or indebtedness.

18. That your plaintiff-appellant (mortgagor) was not in default in any condition of any provision of said mortgage contract or mortgage note, and that your plaintiff-appellant has never yet been given the opportunity to be heard on said wrongful foreclosure, in violation of the Due Process Clause of the Michigan and Federal Constitutions.

19. That the Michigan Supreme Court decision of October 6, 1977, borders on insanity of the members of said court and is conclusively a dishonest decision, absent of integrity and is contrary to law in violence to all well established rules of law.

20. That any person who advocates the continuing of paying moneys to a mortgagee who is flagrantly and abusively violating the terms and conditions of a mortgage contract must be insane.

21. That your plaintiff-appellant (mortgagor) and affiant herein was never opposed to paying escrow on a mortgage contract in accordance with the covenant and agreement under the provisions of said contract.

22. Plaintiff-appellant therefore demands a Stay of Proceedings in publication of said erroneous decision of the Michigan Supreme Court dated October 6, 1977, for the reason that said members of said Michigan Supreme Court should not reveal their insanity to other inhabitants of the State of Michigan and these entire United States and the world.

23. Further your affiant sayeth not. ORAL ARGUMENT REQUESTED.

/s/ Virginia Cramer
Plaintiff-appellant
In propria persona

December 22, 1977

APPENDIX "Q"

At a session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 1st day of February in the year of our Lord one thousand nine hundred and seventy-eight.

Present the Honorable Thomas Giles Kavanagh, Chief Justice, G. Mennen Williams, Charles L. Levin, Mary S. Coleman, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices.
Docket 57215, CR 15-145b&c

On order of the Court, appellant's motion for immediate consideration is considered, and it is GRANTED.

Appellant's motion for stay of proceedings in publication of decision pending review on certiorari to U. S. Supreme Court is treated as an application for rehearing of this Court's opinion of October 6, 1977. Appellant's request is DENIED because the Court is not persuaded that its prior decision in this matter was in error. To the extent that appellant's request for relief also includes a prayer that this court stay publication of its decision of October 6, 1977, said request has become moot, since the opinion has now been published.
See 401 Mich 252; _____NW2d _____(1977).

State of Michigan--ss. * * * "
February 1st, 1978.
(Reported at 258 NW2d 20)

APPENDIX "R"

28 U. S. C. A. 1257 (3)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.
June 25, 1948, c. 646, 62 Stat. 929.

APPENDIX "S"

U. S. C. A. CONST. AMEND. 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX "T"

U. S. C. A. CONST. AMEND. 14,

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "U"

U. S. C. A. CONST. AMEND. 7

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

APPENDIX "V"

28 U. S. C. A. 1652

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 63 Stat. 944.

APPENDIX "W"

CONSTITUTION OF UNITED STATES, Art. 1, Sec. 10

Sec. 10. No State shall enter into any Treaty, Alliance, or Confederation; * * * emit Bills of Credit; * * * pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, * * * .

APPENDIX "X"

12 U. S. C. A. 1461, et seq.

Section 1464. Federal Savings and Loan Associations
(a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations", and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.

(b) (1) An association may raise capital in the form of such savings deposits, shares, or other accounts, for fixed, minimum, or indefinite periods of time (all of which are referred to in this section as savings accounts * * *) as are authorized by its charter or by regulations of the Board, * * * . Section Act Apr. 27, 1934, c. 168, 48 Stat. 646, as amended

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APPENDIX "Y".

12 U. S. C. A. 1701, et seq.

Section 1701. Short title.
This chapter may be cited as the "National Housing Act." June 27, 1934, c. 847, 48 Stat.1246

APPENDIX " AA "

12 U. S. C. A. 1709, et seq.

Section 1709. Insurance of mortgages--Authorization. (a) The Secretary is authorized, upon application by the mortgagee, to insure as hereinafter provided any mortgage offered to him which is eligible for insurance as hereinafter provided, and, upon such terms as the Secretary may prescribe, to make commitments for the insuring of such mortgages prior to the date of their execution or disbursement thereon.

Eligibility for insurance

(b) To be eligible for insurance under this section a mortgage shall--

(1) Have been made to, and be held by, a mortgagee approved by the Secretary as responsible and able to service the mortgage properly.

(2) et seq.

12 U. S. C. A. 1713, et seq. June 27, 1934, c.847, Title II, Section 207, 48 Stat. 1252, as amended.

APPENDIX " BB "

12 U. S. C. A. 1454, et seq.

Section 1454. Purchase and sale of mortgages, residential mortgages; conventional mortgages; terms and conditions of sale or other disposition; authority to enter into, perform, and carry out transactions.

(a) (1) * * *

(2) No conventional mortgage shall be purchased under this section if the outstanding principal balance of the mortgage at the time of purchase exceed 80 per centum of the value of the property securing the mortgage, unless (A) the seller retains a participation of not less than 10 per centum in

the mortgage; (B) for such period and under such circumstances as the Corporation may require, the seller agrees to repurchase or replace the mortgage upon demand of the Corporation in the event that the mortgage is in default; or (C) that portion of the unpaid principal balance of the mortgage which is in excess of such 80 per centum is guaranteed or insured by a qualified insurer as determined by the Corporation. * * * The Corporation shall establish limitations governing the maximum principal obligation of conventional mortgages purchased by it, but such limitations shall not exceed the limitations contained in the first proviso to the first sentence of section 1464(c) of this title.

12 U. S. C. A. 1464 (c) Such associations shall lend their funds only on the security of their savings accounts or on the security of first liens upon real property * * * That any portion of the assets of such associations may be invested in obligations of, or fully guaranteed as to principal and interest * * * or accounts of any bank the deposits of which are insured * * * or in general obligations of any State or of any political subdivision thereof * * * the term "State" shall include the District of Columbia * * * .

* * *

12 U. S. C. A. 1464 (13 (B) As used in paragraph (4) of this subsection, the term "violation" includes without limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation. (et seq.)

APPENDIX " CC "

TITLE 12--Banks and Banking
Chapter V--Federal Home Loan Bank Board
LOANS
545.6 Real estate loans.
545.6-1 Lending powers under sections 13 and 14 of Charter K.

Any Federal association which has Charter K may, under sections 13 and 14 thereof, make the following types of loans on the security of first liens on improved real estate and the use by such an association of loan plans, practices, and procedures which comply with the applicable provisions of sections 545.6 to 545.6-13, are hereby approved by the Board:

(a) Homes or combination of homes and business property--(1) Monthly installment loans; flexible payment loans. Subject to the limitations of Sec. 545.6-7, monthly installment loans and flexible payment loans may be made on homes or combination of homes and business property for an amount not in excess of * * * repayable monthly within * * * years or, if an insured or guaranteed loan, within the period acceptable to the insuring or guaranteeing agency: PROVIDED, that when the members of such an association have authorized loans to be made for an amount exceeding * * *, such loans may be made up to the percentage of value authorized by the members but not in excess of:

(i) 80 percent of the value, if the loan is not an insured or guaranteed loan;

(ii) The maximum percentage of value acceptable to the insuring agency, if an insured loan;

(iii) 80 percent of the value, plus the amount guaranteed if a guaranteed loan.

* * *

(4) Loans in excess of 80 percent of value. The limitation of 80 percent set forth in paragraph (a) (1) (i) of this section shall be 90

percent in the case of any monthly installment loan or flexible payment loan with respect to which the following requirements are met:

(i) * * *

(ii) * * *

(iii) (as amended 1977) The loan contract requires that, in addition to interest and principal payments on the loan, the equivalent of one-twelfth of the estimated annual taxes and assessments on the real estate security be paid monthly in advance to the association;

* * *

(1963 thru 1968)

545.6-1 (4) (iv) The loan contract requires that in addition to interest and principal payments on the loan, the equivalent of one-twelfth of the estimated annual taxes, assessments and insurance premiums on the real estate security be paid monthly in advance to the association;

* * *

APPENDIX " DD "

42 U. S. C. A. 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

APPENDIX " EE "

42 U. S. C. A. 1985, et seq.

(Conspiracy to interfere with civil rights)

(1) If two or more persons in any State or Territory conspire prevent, by force, intimidation, or threat, any person from * * * holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer * * * on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, * * * so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party * * * or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws:

(c) If two or more persons in any State or Territory conspire or go in disguise * * * on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the

laws; * * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U. S. C. A. 1986, et seq.

APPENDIX " FF "

28 U. S. C.A. 2201, et seq.
Chapter 151 - DECLARATORY JUDGMENTS

Sec. 2201. Creation of Remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. as amended,
July 7, 1958, Pub. L. 85-508, 72 Stat. 349.

APPENDIX " GG "

15 U. S. C. A. Section 1, et seq.

Every contract, combination in the form of trust

or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by a fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
As amended,
December 21, 1974, 88 Stat. 1708; December 12, 1975, 89 Stat. 801.

APPENDIX " HH "

15 U. S. C. A. Section 2, et seq.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
As amended,
July 7, 1955, 69 Stat. 282.

APPENDIX " II "

15 U. S. C. A. Section 3, et seq.

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or

or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
As amended,
July 7, 1955, 69 Stat. 282.

APPENDIX " JJ "

15 U. S. C. A. Section 12, et seq.

Section 12. Words defined * * *
Section 13. Discrimination in price, services, or facilities--* * *
(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in

any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * * et seq.
Oct. 15, 1914, c. 323, Sec. 1, 38 Stat. 730, As amended

APPENDIX " KK "

18 U. S. C. A. Section 648

Whoever, being an officer or other person charged by any Act of Congress with the safe-keeping of the public moneys, loans, uses, or converts to his own use, or deposits in any bank or exchanges for other funds, except as specially allowed by law, any portion of the public moneys intrusted to him for safe-keeping, is guilty of embezzlement of the money so loaned, used, converted, deposited, or exchanged, and shall be fined in a sum equal to the amount of money so embezzled or imprisoned not more than ten years, or both; but if the amount embezzled does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
(Act of June 25, 1948, Sec. 1, 62 Stat. 727.)

APPENDIX " LL "

U. S. C. A. CONSTITUTION, ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. * * *
Section 2. The judicial Power shall extend to all

Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;-- * * * to Controversies * * * between Citizens of different States * * * In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. * * *

APPENDIX " MM "

U. S. C. A. CONSTITUTION, ARTICLE IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. * * *

APPENDIX "Z"

MEMORANDUM IN SUPPORT OF MOTION TO SET ASIDE FORECLOSURE

(State of Michigan--Circuit Court--County of Wayne--November 1, 1973)

Plaintiff, Virginia Cramer, in pro per, in support of her motion to set aside foreclosure says as follows:

FACTS

On July 29, 1963, plaintiff executed a promissory note secured by a mortgage on the purchase of her home. The monthly installments of principal, interest and escrow deposits were timely paid; indeed, she made substantial prepayments of principal, to wit: 130 amortized amounts during the period when only 55 amortized amounts, as monthly payments, were required under the terms of the mortgage.

The terms of the mortgage required Mrs. Cramer to pay estimated amounts in monthly installments for the future prepayments of taxes and hazard insurance only. The mortgage contract, which is the only document setting forth the provisions under which the mortgagee may foreclose, does not contain any language for mortgage loan insurance. (Document filed in evidence, incorporated by reference herein.)

Plaintiff-mortgagor made the timely payment on April 26, 1968, consisting of:

Principal and interest	$103.81
Escrow deposit	82.19
Additional principal	10.17
Total ...	$196.17

Also, on April 26, 1968, plaintiff-mortgagor complained to the mortgagee, Metropolitan Federal Savings and Loan Association, that they had failed to pay her taxes when due on numerous occasions; they had embezzled from her escrow account by utilizing amounts for mortgage-loan-insurance which was not provided in the mortgage contract; and they had wrongfully estimated excessive amount of escrow, and they had failed to take into account her escrow deposits of January 1968, February 1968, March 1968, when the mortgagee's estimate of escrow allegedly due was as of December 1967.

Accordingly, thereof, plaintiff insists that by simple arithmetic, that there was a surplus balance in her escrow account of well over $200.00, at the date of foreclosure by advertisement, May 23, 1968.

On May 23, 1968, defendants-mortgagee foreclosed by advertisement on erroneous figures, as follows:

Total indebtedness	$12,041.91
Interest	76.43
Alleged escrow shortage	401.03
as published	$12,519.37

The defendants-mortgagee's claim of escrow "shortage" in the amount of $401.03 was not to be expended until sometime in July 1968, which amount of $101.33 was the eventual city tax assessment. The next expenditure would have been due in December, 1968, more than six months after the foreclosure publication. The defendant-mortgagee foreclosed in May 1968 for an escrow amount which they knew would not be assessed as taxes on the real property until two months (July 1968) following the published foreclosure date of May 23, 1968.

There was no deficiency in Mrs. Cramer's escrow account as of May 23, 1968, the foreclosure date. There was a surplus balance of well over $200.00 which would have been more than sufficient to meet the next expenditure for the prepayment of tax assessment of only $101.33 for city taxes.

On oral argument by the attorneys for the parties herein, on February 3 and 4, 1972, the transcript shows as follows:

Page 28 -- "Mr. Thorpe: She had failed to pay her interest -- some few days late, as a matter of fact. That is not why we foreclosed the mortgage." (emphasis supplied)

Plaintiff-mortgagor's payment was due on May 15, 1968. The promissory note contains language stating that no penalty is to be assessed for payments made during the fifteen (15) days following the due date. However, the defendants-mortgagee foreclosed on May 23, 1968, only seven (7) days after the due date of May 15, 1968.

In the discovery deposition of Roger C. Richards, President of Metropolitan Savings and Loan Association, defendants herein, the transcript shows as follows:

Page 8 -- "Q: Mr. Richards, directing your attention to late charges on loans, what is your institution's policy in regard to late charges?

A: Late charge may be imposed if the payment is 15 days late."

Page 9 -- "Q: Would I be correct in assuming then that you consider late charge as part of your agreement with Mrs. Cramer?

A: According to the terms of the note."

Page 10-- A: It says after the 30th add late charge." (by Mr. Richards)

Q: All right. Would you ordinarily contemplate foreclosure proceedings prior to the 30th of the month?

A: On a 15-day lateness?

Q: Yes.

A: No, if that were the only default."

Page 12-- "Q: As to the escrow funds, Mr. Richards, whose money do you consider that is?

A: That is the borrower's funds.

Q: Would you consider that the bank is in a position of trust as to those funds?

A: Yes."

Page 27-- "Q: If, during a 12-month period when you estimate escrow funds, it becomes apparent that there will be more owed than the mortgagor has paid into the organization, would you consider that a debt owing by the mortgagor to your organization prior to your expending funds?

A: Not prior to expending funds. After expending funds.

Q: In other words, I take it that you did not expend funds the mortgagor would not be indebted to you, in reference to the last question?

A: Yes"

Defendants-mortgagee foreclosed, on May 23, 1968, on an alleged escrow amount of $401.03 which was not expended. Plaintiff-mortgagor was not indebted to the mortgagee for the amount of $401.03 which was included in the foreclosure figure of $12,519.37.

The plaintiff-mortgagor was not personally notified of the foreclosure sale of October 1, 1968.

The fair market value of the real property foreclosed upon was and is in excess of $50,000.00.

ARGUMENT

In the case cited by the Michigan Court of Appeals opinion of May 29, 1973, Stewart v Eaton, 287 Mich Rep 466 (1939), both the affirming and the dissenting opinions held:

> "* * * that unless the sale is set aside, there is no defense to an action at law." Id. 473 "* * * where the holder of the mortgage is the purchaser of the property, that the property was worth much more than the amount bid on the foreclosure, because he can be personally heard and make defense in no other way. * * * and the defendant may show anything in his defense to a suit upon the note that he could show in case of foreclosure by advertisement. He can be personally heard and make defense in no other way." Id. 483-484 " * * * unless the sale is set aside, the inadequacy of the price is not open as a defense in an action at law to recover the deficiency." Id 486

Plaintiff herein states that the property foreclosed upon by the defendants herein is and was worth a much greater sum than the $12,519.37 foreclosure figure. The property is valued in excess of $50,000.00, and that the defendants foreclosed in bad faith, without conscience, after having embezzled from plaintiff's escrow funds, and upon mortgagor's complaint that the said mortgagee had mishandled her escrow funds by failing to pay taxes when due, among other things.

As a matter of fact, there can be no other conclusion made other than that the defendants herein foreclosed on the plaintiff because she objected to the mishandling of the escrow funds on the part of the mortgagee. It is clear, therefore, that the defendants herein foreclosed in malice, bad faith, without conscience, and with the intent to damage and harm your plaintiff, in the fifteen (15) day period when, by their own admission, no penalty would be charged to the plaintiff.

In Kavolsky v Kaufman, 273 Mass 418, 173 NE 499, (sale by advertisement under power), the court said:

> "It is the duty of the mortgagee, where the mortgage leaves him a power of selection of methods of giving notice and of making the sale, to act reasonably and to exercise a sound discretion. In such a case it is his duty to act as a reasonably prudent man would to obtain a fair price for property which has a well known value. * * * "

Defendants-mortgagee, in the instant case, foreclosed upon the plaintiff's own money

(demand for excessive escrow, which was not a deficiency and not a debt) with malicious intent to steal plaintiff's property, valued in excess of $50,000.00, for a measly $12,519.37. The defendants did this, when plaintiff had an excellent payment record, for the reason that plaintiff simply complained and objected to the mortgagee's mishandling of her own escrow money; plaintiff-mortgagor had requested that she be permitted to pay her own liabilities with her own money, rather than deposit the same in escrow for the defendants herein to mishandle.

Further, in Stewart v Eaton, supra, the court said:

> "If the mortgagee exercises foreclosure under a power of sale he is bound to the observance of good faith and to a careful regard for the interest of his principal, and if the mortgagor can establish a purchase by the mortgagee at such a grossly inadequate price as to shock the conscience of the court, to the point of establishing fraud, then the mortgagor, in a suit upon the primary obligation, may make such defense in an action at law." Id 487

In the Summary of Pretrial Conference of October 5, 1971, before the Honorable Benjamin D. Burdick, his summary states:

> "This is a suit to set aside a mortgage foreclosure."

Plaintiff-mortgagor was not in default of the mortgage and not in default in the escrow deposits pursuant to the terms of the mortgage. The matter of default has never been proven by the defendants herein who foreclosed so maliciously, so wrongfully, so damagingly, and without

conscience, upon the plaintiff's property.

The court has jurisdiction in this matter, in personam and in rem, both.

Wherefore, plaintiff requests that mortgage foreclosure sale be set aside and that your plaintiff be also granted such other relief consistent with the good conscience of the court as may be deemed necessary and proper, and such other and further relief as this case may require.

Respectfully,
/s/ Virginia Cramer
In Pro Per

November 1, 1973

Supreme Court, U. S.
FILED
MAY 25 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1558

VIRGINIA CRAMER,
Petitioner,

v.

METROPOLITAN FEDERAL
SAVINGS AND LOAN ASSOCIATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1558

VIRGINIA CRAMER,
Petitioner,

v.

METROPOLITAN FEDERAL
SAVINGS AND LOAN ASSOCIATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

Respondent does not question the opinions listed in the Petition.

JURISDICTION

Respondent does not question Petitioner's invoking of 28 USCA § 1257(3) for purposes of jurisdiction, but does question whether 28 USCA § 1652 provides any jurisdictional grounds hereunder.

QUESTION PRESENTED

Petitioner presents no question or questions properly reviewable on certiorari. The only federal question raised below was whether the Michigan statute providing for nonjudicial foreclosure of mortgages on real property violates the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment: ". . . nor should any state deprive any person of life, liberty or property without due process of law."

STATEMENT OF THE CASE

Although some of the relevant facts along with many irrelevant facts are scattered through Petitioner's unduly lengthy Petition, a precise summary is required for a determination on her Petition.

In 1963, Petitioner, Virginia Cramer (hereinafter "Mrs. Cramer") applied for and obtained a commitment for purchase money mortgage for a new house from the Respondent, Metropolitan Federal Savings and Loan Association (hereinafter "Metropolitan").[1] On July 29, 1963, Mrs. Cramer executed a mortgage note (Petition, pp 18-20) and a mortgage (Petition, pp 20-23). Mrs. Cramer commenced payments and during subsequent years a

[1] At that time the Respondent was chartered under the laws of the United States. During the course of these proceedings Respondent was chartered under the laws of the State of Michigan with a resulting name change and is sometimes referred to in the proceedings below as Metropolitan Savings Association.

controversy arose over the amounts required to be paid pursuant to paragraph 2 of the mortgage. Such amounts, commonly called escrow, were for monthly prepayments of taxes, assessments and insurance premiums and were, as stated in said paragraph, "In order to more fully protect the security of the mortgage. . .".

Subsequently, upon Mrs. Cramer's failure to maintain the required escrow balance, and pursuant to paragraph 8 of the mortgage, Metropolitan accelerated the entire balance and pursuant to the power of sale also contained in paragraph 8, commenced a nonjudicial foreclosure on May 23, 1968.

On August 12, 1968, Mrs. Cramer, prior to sale, commenced the instant action and obtained a temporary restraining order restraining the sale. On August 16, 23, 30 and September 6, 1968, hearings were held in the Wayne County Circuit Court on the temporary restraining order and pursuant to such hearings, the temporary restraining order was dissolved and the property was sold at a sheriff's sale on October 1, 1968. Mrs. Cramer redeemed from the sale on June 5, 1969.

After further preliminary proceedings not herein pertinent, Mrs. Cramer filed a Second Amended Complaint (Petition, App. "H") alleging breach of contract, abuse of person, libel and slander, breach of fiduciary relationship, invasion of privacy, and intentional infliction of emotional distress. All theories were predicated on the above factual situation and were dependent on Mrs. Cramer proving a wrongful foreclosure.

Subsequently, during the numerous proceedings below, the trial courts determined that Mrs. Cramer had defaulted under the terms and conditions of the mortgage,

that Metropolitan as mortgagee was entitled to commence foreclosure of the mortgage pursuant to the power of sale, and that Metropolitan had complied with the Michigan statute governing nonjudicial foreclosures of real property.

Mrs. Cramer alleged other theories in her Second Amended Complaint (Petition, App. "H"), all dependent on proof of a wrongful foreclosure and, therefore, the trial court dismissed Mrs. Cramer's Second Amended Complaint on Summary Judgment (Petition, App. "I").

Mrs. Cramer appealed to the Michigan Court of Appeals. That Court upheld the trial court as to the propriety of the foreclosure, but remanded Count IV "Breach of Fiduciary Relationship" for trial (Petition, App "J"). That part of Mrs. Cramer's claim went to a jury trial resulting in a verdict favorable to Metropolitan. (Petition, App. pp. 77, 78). Mrs. Cramer again appealed to the Michigan Court of Appeals which affirmed its previous opinion and affirmed the jury verdict (Petition, App "C").

Mrs. Cramer applied for and obtained Leave to Appeal to the Michigan Supreme Court. The Michigan Supreme Court affirmed the propriety of the foreclosure and proceedings below and also held that the Michigan Foreclosure Statute did not violate the Fourteenth Amendment to the United States Constitution and Art. 1, Section 17 of the Michigan Constitution.

REASONS FOR DENYING WRIT

I

THE LEGALITY OF THE FORECLOSURE IS A STATE MATTER NOT INVOLVING A FEDERAL QUESTION

The decision of the Michigan Supreme Court affirming the decision of the Michigan Court of Appeals affirming the Summary Judgment of the trial court upholding the propriety of the foreclosure rests on adequate and independent state law. The Michigan Supreme Court interpreted the foreclosure by advertisement remedy in the mortgage as an incident of the private right of contract stating in the instant matter, *Cramer* v. *Metropolitan Savings Association*, 401 Mich 252, 261:

> Recognizing the parties' prerogative to provide for their own contract, we said in *White* v. *Burkhardt*, 338 Mich 235, 239; 60 NW2d 925 (1953):
>
> > 'Foreclosure of mortgages by advertisement and sale has been in use in this State for about 100 years, and is well understood. Such statutory foreclosures should not be set aside without some good reason therefor. *Markoff* v. *Tournier*, 229 Mich 571, 201 NW 888 (1925), and *Detroit Trust Co.* v. *Agozzinio*, 280 Mich 402, 496, 273 NW 747 (1937). Statutory foreclosures are a matter of contract, authorized by the mortgagor, and ought not to be hampered by an unreasonably strict construction of the law. *Lee* v. *Clary*, 38 Mich 223 (1978) and *Peterson* v. *Jacobs*, 303 Mich 329, 335, 6 NW2d 533 (1942).'

Since the propriety of the foreclosure rested on independent and adequate state grounds, this Court on jurisdictional grounds should not grant a petition for certiorari pursuant to 12 § USCA 1257(3) concerning interpretation of a private contract to wit: the provisions of the mortgage, default thereunder, compliance with the foreclosure statute and all other matters collateral thereto and therefore dependent thereon, i.e., the theories alleged in Mrs. Cramer's Second Amended Complaint. *Murdock* v. *City of Memphis*, 20 Wall 590, 22 L Ed 429 (1875), *Herb* v. *Pitcairn*, 325 US 117, 89 L Ed 789, 65 S Ct 459 (1944). Such matters have been finally decided by the Michigan Supreme Court, *Neblett* v. *Carpenter*, 305 US 297, 83 L Ed 182, 59 S Ct 170 (1938).

II.

MATTERS NOT RAISED IN THE PROCEEDINGS BELOW NOT GROUNDS FOR GRANTING CERTIORARI

Mrs. Cramer, in her Petition, for the first time in the lengthy proceedings underlying this matter, has alleged violation of the anti-trust, civil rights laws, and other possible theories not specifically enumerated. Such claims have not been duly raised below and should not be raised on certiorari. *Cardinale* v. *Louisiana*, 369 US 437, 89 S Ct 1161, 22 L Ed 2d 398 (1969); *Tacon* v. *Arizona*, 410 US 351, 35 L Ed 346, 935 S Ct 998 (1973).

III

THE MICHIGAN SUPREME COURT'S DETERMINATION THAT THE MICHIGAN FORECLOSURE BY ADVERTISEMENT STATUTE DOES NOT VIOLATE THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION OR ARTICLE I, SECTION 17 OF THE MICHIGAN CONSTITUTION AS A VIOLATION OF DUE PROCESS OF LAW IS IN ACCORD WITH THE DECISIONS OF THIS COURT AND THE SEVERAL UNITED STATES COURTS OF APPEAL.

The Michigan Supreme Court held that the existence of a Statute, MCLA § 600.3201, MSA 27A.3201, which permitted a mortgagee to foreclose nonjudicially by advertisement pursuant to the provisions contained in the mortgage did not constitute state action.

The power of sale contained in the mortgage has been held as an incident of the private right to contract. *Equitable Trust Co.* v. *Barlum Realty Co.*, 294 Mich 167, 292 NW 691 (1940). The option to foreclosure nonjudicially is a contract remedy long recognized in Michigan and the courts have recognized the parties' prerogative to so provide. *White* v. *Burkhardt, supra.*

The specific question of whether the Michigan Foreclosure by Advertisement Statute violated due process in that it required neither a notice of hearing nor a hearing to establish the debt was specifically decided by the Michigan Supreme Court.[2] The Michigan Supreme Court

---

[2] Mrs. Cramer had been involved in innumerable court hearings on the subject during the ten year history of this litigation.

relied upon the Sixth Circuit Court of Appeals' opinion in *Northrip* v. *Federal National Mortgage Association*, 527 F2d 23 (1975), in construing the same Michigan statute, and found no significant state action holding that the due process clause is a limitation on governmental action, not private action.

The same attack has been determined by other circuits upon similar provisions in mortgages for execution of the power of sale or like accelerations by the mortgagee and foreclosure by nonjudicial action, usually involving advertisement in a local paper and posting on the property. The courts have uniformly found that the procedure was a private contractual matter and found no significant state action invoking Fourteenth Amendment protection. The District of Columbia's statute withstood the same challenge in *Bryant* v. *Jefferson Federal Savings and Loan Association*, 509 F2d 511 (1974); the Texas statute in *Barrera* v. *Security Building & Investment Corporation*, 519 F2d 1166 (1975); the Virginia statute in *Levine* v. *Stern*, 560 F2d 1175 (1977); and the Georgia statute in *Roberts* v. *Cameron-Brown Co.*, 556 F2d 356 (1977).

There is no compelling reason to grant certiorari under the facts and cases stated above.

CONCLUSION

It is respectfully submitted that Mrs. Cramer has failed to sustain her burden of establishing special and important reasons for granting a Writ of Certiorari. U.S. Sup. Ct. Rule 40. The decision of the Michigan Supreme Court concerning interpretation of the mortgage, foreclosure and other proceedings soundly rest on independent and adequate state law. The identical due process issue has been uniformly decided by various Circuit Courts of Appeal. Those opinions are in accord with the decisions of this Court. For the reasons stated above Mrs. Cramer's Petition should be denied.

Respectfully submitted,

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By: William P. Thorpe
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Dated: May 22, 1978